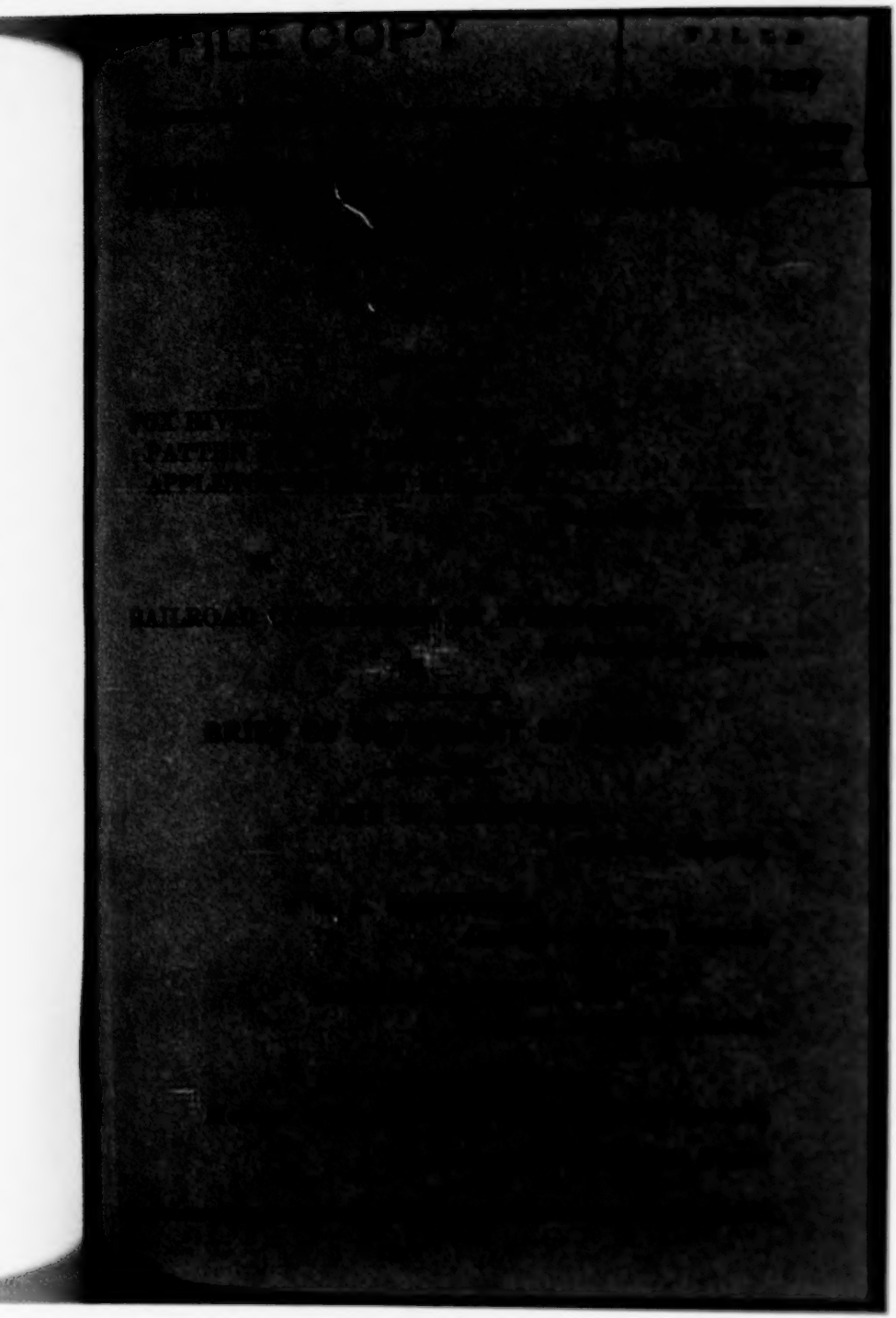
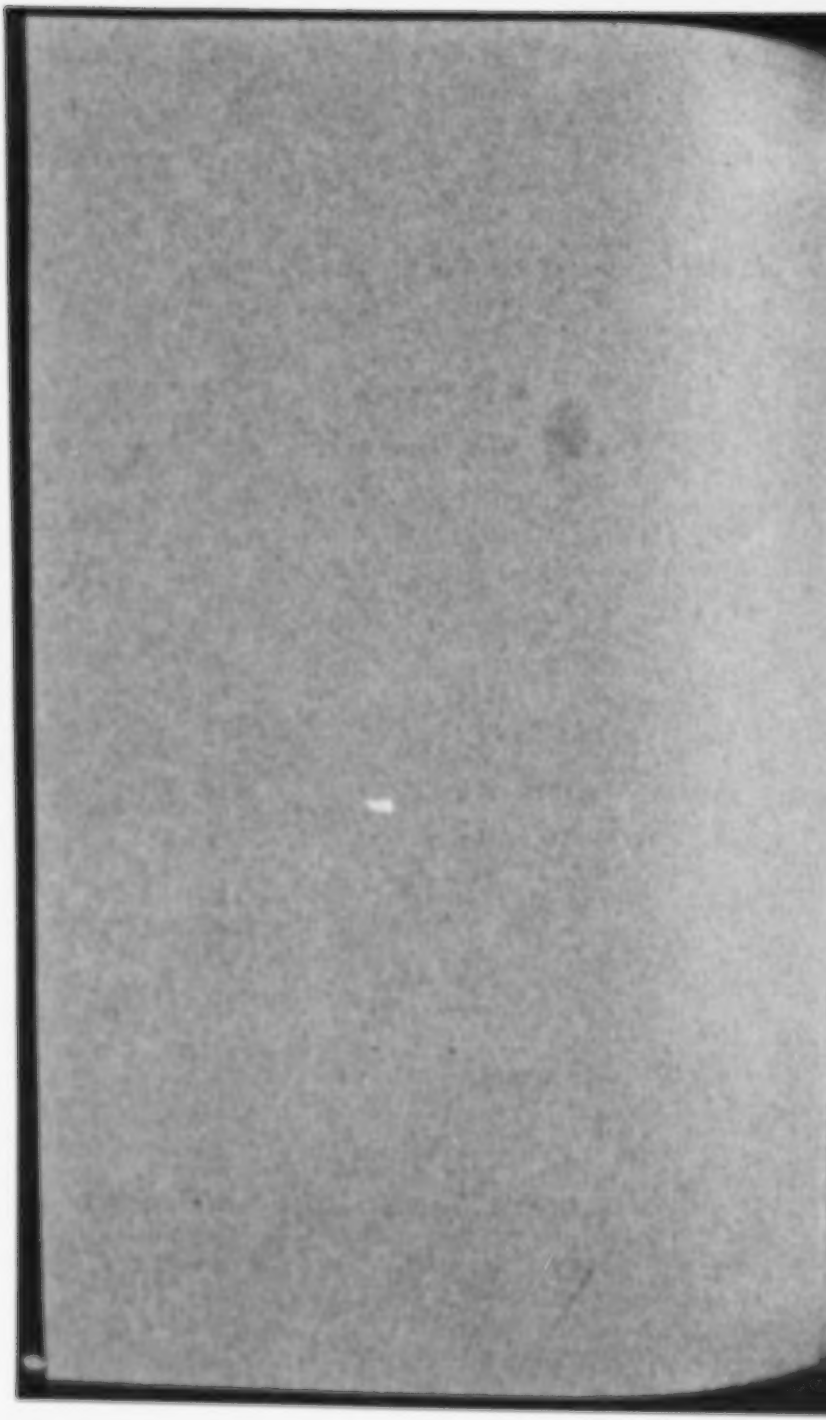




Page

SUBJECT INDEX

STATEMENT OF FACTS 1

CONTENTION OF PLAINTIFFS IN ERROR..... 3

CONTENTION OF DEFENDANT IN ERROR..... 3

ISSUES INVOLVED 3

HISTORY OF STATE LEGISLATION PERTAINING TO RIVERS AND STREAMS .....49-54, incl.

WISCONSIN WATER POWER LAW .....55-75, incl.

SYNOPSIS OF ARGUMENT

This court is without jurisdiction..... 4
There is no federal question presented or decided.

The decision of the state court upon a purely state question is adequately sustained in the record and therefore this court will not assume jurisdiction. 7

I.

The Fox River is a meandered navigable stream of the State of Wisconsin. 18

II.

The erection of any dam, bridge or other obstruction over any meandered navigable stream, even though it does not interfere with navigation is a nuisance abateable as such. 18

Page

III.

The state may authorize the erection of dams over navigable streams for public purposes, other than the imrpovement of navigation, as, for example, to provide a municipal water supply. 19

IV.

In the exercise, at least, of the public right to improve the navigation of a navigable stream, the state may without compensation to the riparian owner impair or totally destroy riparian rights. 20

V.

Public rights in navigable waters are not limited to navigation but include the right of fishery, the right of taking ice, the development of the river for municipal water supply and for all beneficial public purposes. 22

VI.

The undeveloped power of a navigable stream is not a riparian right. The energy of falling water when developed by the erection of a dam is appurtenant to the dam and not to the riparian lands. The dam may only be constructed by the state or under the authority of the state. The energy of falling water developed by means of a dam, if it is capable of ownership, must vest in the state; hence, it follows that the energy so developed had its source, in either (1) something not capable of ownership and therefore no one's property, or (2) the property of the state. 26

Page

VII.

A riparian owner on a navigable river has no right as such to the developed water power. He cannot build the dam without legislative authority and hence cannot create such power. Apparent exceptions to this rule are cases involving non-navigable streams or cases in which such right may be acquired under the Mills Dam Act. In Michigan, as in Wisconsin, the technical title to beds of rivers is in the riparian owner. In the *United States v. Chandler-Dunbar Company*, a case arising in Michigan, it was held that the riparian owner held no private property in the power capacity of the rapids and falls of the St. Marys River, that whatever substantial private property rights exist in the falls of the stream must come from some right which the company has to construct and maintain such works in the river, such as a dam, walls, dykes, etc., essential to the utlization of the power of the stream for commercial purposes. 27

VIII.

The developed power is appurtenant to the dam and not to the riparian lands. 31

IX.

The state being in a position where it can either deny or grant a permit to construct, operate and maintain a dam whereby the water power capacity of the stream which does not belong to the riparian owner may be utilized may impose conditions under which the right to erect the dam may become effective, and as one of these conditions may insist that the grantee of the permit sell the development on a basis of value, which is determined in advance of the granting of the permit. In granting a permit the state grants a franchise and exacts as conditions for such grant the right to purchase the development. 33

Page

X.

The cases cited by the plaintiff in error do not sustain the propositions for which they are cited. 35

XI.

If the Wisconsin Water Power Act is declared unconstitutional, the Federal Water Power Act will also fall.

XII.

Conclusion 47

TABLE OF CASES

Page

Adams v. Russell, 229 U. S. 353, 357, 360 8

Allaby v. Mauston Elec. Co., 135 Wis. 345 41

Allen v. Arguimbau, 198 U. S. 149, 154, 155 7

Attorney General v. Eau Claire, 40 Wis. 533, 540, 541 24

Bachtel v. Wilson, 204 U. S. 36, 40 ..... 7, 10

Bank of Antigo v. Ryan, 105 Wis. 37, 40 12

Barnes v. Racine, 4 Wis. 474 19

Barney v. Keokuk, 94 U. S. 324, 338 5

Black River Improvement Co. v. La Crosse etc. Co., 54 Wis. 659, 680, 681, 682 ..... 22, 24

Boom Co. v. Reilly, 46 Wis. 237, 243 24

Booth Fisheries Co. et al v. Industrial Commission of Wisconsin, et al, 271 U. S. 208, 210 12

Campbell v. Olney, 262 U. S. 352, 354 4

Castillo v. McConnico, 168 U. S. 674, 683, 684 15

Central Land Co. v. Laidley, 159 U. S. 103, 112 15

Cohn v. Wausau Boom Co., 47 Wis. 314, 325 ..... 20, 24

Conn Co. v. Little Suamico, 74 Wis. 652, 662, 663 ..... 19, 39

In re Crawford County Drainage District, 182 Wis. 404 16

Crawford County Levee & Drainage District, etc. v. J. R. Huston, et al, 264 U. S. 598 17

Cuyahoga Power Co. v. Northern Realty Co., et al, 244 U. S. 300, 303, 304 ..... 8, 10

DeSaussure v. Gaillard, 127 U. S. 216, 234 16

Des Moines National Bank v. Fairweather, 263 U. S. 103, 105 4

Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 69 7

Donnelly v. United States, 228 U. S. 243, 261 5

In re Eldred, 46 Wis. 530 19

Enterprise Irrigation District, et al v. Farmers Mutual Canal Co., et al, 243 U. S. 157, 163 15

Page

Eustis v. Bolles, 150 U. S. 361, 366, 370 ..... 5, 7, 8

Falls Manufacturing Co. v. Oconto Co., 87 Wis. 134, 150, 151 22

Fox River Flour and Paper Co. v. Kelley, et al, 70 Wis. 286, 294 35

Green Bay and Mississippi Canal Co. v. Kaukauna Water Power Co. 70 Wis. 635, 649, 651, 653, 656; 142 U. S. 254, 272, 273, 276, 277, 281, 282 ..... 36, 37, 38, 39, 42

Hardin v. Jordan, 140 U. S. 371, 382 5

Hurley v. Commission of Fisheries, 257 U. S. 223, 225 15

Illinois Steel Co. v. Bilot, 109 Wis. 418, 425 24

Johnson v. Risk, 137 U. S. 300, 306, 307 ..... 7, 9

Jones v. Pettibone, et al, 2 Wis. 225, 235 24

Kansas v. Colorado, 206 U. S. 93 5

Kansas City, Memphis & Birmingham Railroad Co. v. Stiles, 242 U. S. 111, 117 15

Karlen v. Trickle, 189 Wis. 148, 153 12

Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co. et al 75 Wis. 385 41

Kimberly Clark Co. v. Hewitt, et al, 79 Wis. 334, 337, 338 41

Klinger v. Missouri, 13 Wall 257, 263 ..... 7, 8

Lawson v. Mowry, 52 Wis. 219, 237 32

Lawton v. Racine, 137 Wis. 593, 600 12

Maps of Original Survey of Township 21 North of Range 17 East of the Fourth Principal Meridian in Northwest and Wisconsin Territories, signed by the Surveyor General on July 21, 1835 and December 31, 1844, respectively, on file in the office of the Commissioner of Public Lands at Madison, Wisconsin 18

McGilvra v. Ross, 215 U. S. 79 5

McLennon v. Prentice, 85 Wis. 427, 442 23

Norton v. Whitside, 239 U. S. 144, 153 5

Page

Old Colony Trust Co. v. Omaha, 230 U. S. 100, 116 16
Packer v. Bird, 137 U. S. 661, 669 5
Palmer v. Ohio, 248 U. S. 32, 34 4
Pera v. Shorewood, 176 Wis. 261, 263 ..... 13, 14
Pewaukee v. Savoy, 103 Wis. 271, 274 24
Preston v. Chicago, 226 U. S. 447, 450 16
Priewe v. Wisconsin State L. & I. Co., 93 Wis. 534, 546 23
Rossmiller v. State, 114 Wis. 169, 186, 187 ..... 23, 24
St. Louis & Kansas City Land Co. v. Kansas City, 241 U. S. 419, 427 16
Sayward v. Denny, 158 U. S. 180, 186 15
Scott v. Lattig, 227 U. S. 229, 243 5
Shively v. Bowlby, 152 U. S. 1, 40, 58 5
Smith v. Ford, 48 Wis. 115, 164 31
State v. Eau Claire, 40 Wis. 533 19
State ex rel Kellogg v. Currens, et al, 111 Wis. 431 13
Stoughton v. State, 5 Wis. 291 19
Superior Water Co. v. Superior, 263 U. S. 125, 134, 135 and cases cited 34
U. S. v. Chandler-Dunbar Co., 29 U. S. 53, 61, 62, 69 ..... 27, 28, 29, 30, 47
Wall v. Cloud, 22 Humphreys' Report, 181 (Tenn.) 32
Water Power Cases, 148 Wis. 124, 149, 150 ..... 44, 45, 46
West et al v. Fox River Paper Co., 82 Wis. 647, 653, 656 ..... 18, 43
Willow River Club v. Wade, 100 Wis. 86, 97, 99, 101, 102, 104, 113, 114 ..... 23, 24, 25
Wisconsin River Improvement Co. v. Lyons, 30 Wis. 61, 67 19

STATUTES, CONSTITUTIONAL PROVISIONS, SESSION LAWS

Page

U. S. Const.
Art. IV—sec. 2 13
Amendment V 3, 4
XIV 3, 4, 13

U. S. Stats.
41 Stats. at L. 1063-1077 46

Wis. Const.
Art. I—sec. 1 13
13 3

Laws 1839-40.
No. 48 ..... 40, 54

Laws 1840-41.
No. 9 49

Laws 1853.
Ch. 72 ..... 49, 52

Laws 1881.
Ch. 220 ..... 40, 54

Laws 1911.
Ch. 652 49-50

R. S. 1849.
Ch. 34 49

R. S. 1858.
Ch. 41—sec. 2 49
3 52
112 53

R. S. 1878.
Sec. 1596 ..... 40, 49
1597 52-53
1598 ..... 40, 53

Stats. 1898.
Ch. 205 54

Stats. 1911.
Sec. 1596 1 49-50
2 50
3 50
4 50

Page

Stats. 1915.
Sec. 1596 3 54
4 51
1596-22 1 50
2 51
1598 50

Stats. 1917.
Sec. 30.01 50
30.10 53
31.23 ..... 50-51, 54
31.24 51

Stats. 1919.
Sec. 30.01 (4) (c) 53

Stats.
Sec. 30.01 51
(4) (c) 53
31.01 to 31.33 ..... 16, 55-75
31.05 2
31.07 2
31.09 2-3
(3) 1, 2, 3, 4, 41, 46
31.23 51
31.24 51
31.25 51
31.31 54
31.32 54
31.33 54

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 492

FOX RIVER PAPER COMPANY,
PATTEN PAPER COMPANY, LIMITED,
APPLETON WOOLEN MILLS ET AL.,
Plaintiffs in Error,

vs.

RAILROAD COMMISSION OF WISCONSIN,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

This is an appeal by writ of error from a judgment in the supreme court of the state of Wisconsin, affirming without opinion the judgment of the circuit court of Dane county, Wisconsin, upholding the constitutionality of sec. 31.09, subsec. (3) of the Wisconsin statutes, and dismissing the complaint of plaintiffs in error.

STATEMENT OF FACTS

In 1878 the grantors and predecessors of plaintiffs in error constructed a dam known as the Middle Dam across the Fox river at Appleton, Wisconsin. This structure was erected and has since been maintained by plaintiffs in error, their predecessors, and grantors without legislative authority.

On May 13, 1925 plaintiffs in error presented their application to defendant in error under sec. 31.05, Wisconsin statutes, for a permit to rebuild this dam (T. R. 10). The application was dismissed without prejudice on May 15, 1925 (T. R. 21). On May 21, 1925 the plaintiffs in error renewed their application and sought a permit to operate and maintain an existing dam under sec. 31.07, Wisconsin statutes (T. R. 23). The defendant in error re-examined said application and on May 25, 1925 dismissed it without prejudice, because plaintiffs in error would not submit with the application the proposals called for by sec. 31.09, subsec. (3), Wisconsin statutes (T. R. 23).

Certain conditions under which permits may be issued are stated in sec. 31.09, Wisconsin statutes. This section is as follows:

"Each applicant for a permit to construct, operate and maintain a dam for the purpose of developing power or for the purpose of aiding in the development of power by other dams through the creation of reservoirs or otherwise, and each applicant for a permit to construct, operate and maintain a dam for any other purpose whatsoever, which is capable of developing fifty theoretical horse power or more available for fifty per cent of the time throughout the year, shall file with his application for a permit, in addition to the requirements of section 31.05 or section 31.07, as the case may be, the following proposals:

"(1) That the commission prior to the time the permit is granted shall value the dam site and all flowage rights and other property necessary for the purposes set forth in the application for the permit, whether the same or any part thereof are owned by the applicant or not.

"(2) That the commission shall audit all outlays for property and for the construction of the dam, buildings, and other structures and works constructed, main-

tained, and operated and used and useful under the permit.

"(3) That the permit, if granted, shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation."

The defendant in error in dismissing the applications asserted that it lacked jurisdiction to honor the application for the permit, since plaintiffs in error failed to file the proposals required by sec. 31.09, subsec. (3), Wisconsin statutes.

Plaintiff in error then commenced an action under the Wisconsin statutes in the circuit court for Dane county, Wisconsin, to review the order of the defendant in error, asserting that they were deprived of the legal and proper use of their water power in the Fox river in violation of section 13, article I of the Wisconsin constitution and article 5 and the 14th amendment of the federal constitution.

Defendant in error answered, alleging that its order violated no constitutional right of plaintiffs in error. To this answer plaintiffs in error demurred, questioning the

constitutionality of sec. 31.09, subsec. (3), Wisconsin statutes. The demurrer was overruled, plaintiffs in error refused to proceed to trial on the merits of the case, and the lower court thereafter dismissed the complaint of plaintiffs in error.

ARGUMENT

This court is without jurisdiction herein

There is no federal question presented nor involved.

The complaint alleges that the action of defendant in error in refusing to hold a hearing and grant the permit deprives plaintiffs in error of the legal and proper use of their water power in violation of article 5 and the 14th amendment of the federal constitution (T. R. 9), but that of itself is not sufficient to confer jurisdiction upon this court.

There was no federal question raised or decided, and judgment as rendered could have been given without deciding it.

There is no opinion of the Wisconsin supreme court herein and under the similar rule hereinafter stated, it may be necessary to consider the questions before the lower court.

Unless a federal right is involved this court will not review a state court's application of local laws.

Palmer v. Ohio, 248 U. S. 32, 34;
Campbell v. Olney, 282 U. S. 352, 354.

Both as to the validity and construction where no federal question is involved, a decision of the highest court of the state is controlling.

Des Moines National Bank v. Fairweather, 263 U. S. 103, 106.

"It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock v. Memphis*, 20 Wall. 590; *Cook County v. Calumet & Chicago Canal Co.*, 138 U. S. 635."

Eustis v. Bolles, 150 U. S. 361, 366.

Questions as to title to land beneath navigable waters of any state are to be resolved wholly by state law.

Barney v. Keokuk, 94 U. S. 324, 338;
Packer v. Bird, 137 U. S. 661, 669;
Hardin v. Jordan, 140 U. S. 371, 382;
Shively v. Bowlby, 152 U. S. 1, 40, 58;
Scott v. Lattig, 227 U. S. 229, 243;
Donnelly v. United States, 228 U. S. 243, 261;
Norton v. Whiteside, 239 U. S. 144, 153;
McGilvra v. Ross, 215 U. S. 79.

The state may determine what rule shall apply as to the use of waters and riparian rights.

Kansas v. Colorado, 206 U. S. 46, 93, and cases cited *supra*.

In *Donnelly v. United States*, *supra*, this court said, pages 261-262:

"* * * In *Barney v. Keokuk*, 94 U. S. 324, 338, it was held that it is for the States to establish for themselves such rules of property as they may deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent thereto. The court, speaking through Mr. Justice Bradley, said (94 U. S. 338): 'The confusion of navigable with tide water, found in the monuments of the common-law, long pre-

vailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. *Whether, as rules of property, it would now be safe to change these doctrines where they have been applied as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.* In our view of the subject the correct principles were laid down in *Martin v. Waddell,* 16 Pet. 367; *Pollard's Lessee v. Hagan,* 3 How. 212; and *Goodtitle v. Kibbe,* 9 Id. 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee Chief,* 12 Id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. *It properly belongs to the States by their inherent sovereignty,* and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated.'

"The doctrine thus enunciated has since been adhered to. *Packer v. Bird,* 137 U. S. 661, 669, *Hardin v. Jordan,* 140 U. S. 371, 382; *Shively v. Bowlby,* 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co. v. Water Commis-*

sioners, 168 U. S. 349, 358; *Scott v. Lattig,* 227 U. S. 229, 243."

Such an issue being a state issue so-called, involving the state's control over navigable waters and the rights of riparian owners, is in no sense a federal question and may not be depended upon to bring this matter to the attention of this court.

"* * * However, that may be, we think that, when we find it unnecessary to decide any Federal question, and when the state court has based its decision on a local or state question, our logical course is to dismiss the writ of error. This was the judgment pronounced in *Klinger v. Missouri,* 13 Wall. 257; *N. O. Waterworks v. Louisiana Sugar Co.,* 125 U. S. 18; *Kreigher v. Shelby Railroad,* 125 U. S. 39; *De Saussure v. Gaillard,* 127 U. S. 216; *Hale v. Akers,* 132 U. S. 554; *Hopkins v. McLure,* 133 U. S. 380; *Johnson v. Risk,* 137 U. S. 300, 307; and in numerous other cases which it is unnecessary to cite."

Eustis v. Bolles, 150 U. S. 361, 370.

The decision of the lower court upon a purely state question is adequately sustained in the record and therefore this court will not assume jurisdiction

If it appear that the court did not, in fact, base its judgment upon an independent ground or where it does not appear on which one of two grounds the judgment was based, if the independent ground on which it might have been based was a good and valid one, sufficient in itself, to sustain the judgment, this court will not assume jurisdiction.

Klinger v. Missouri, 13 Wall. 257, 263;
Johnson v. Risk, 137 U. S. 300, 306, 307;
Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 69;
Allen v. Arguimbau, 198 U. S. 149, 154-155;
Bachtel v. Wilson, 204 U. S. 36, 40;

Adams v. Russell, 229 U. S. 353, 357-60;
Cuyahoga Power Co. v. Northern Realty Co. et al., 244 U. S. 300, 303.

There is no state supreme court opinion herein nor was there any in *Klinger v. Missouri, supra, Johnson v. Risk, supra, Allen v. Arguimbau, supra, Bachtel v. Wilson, supra,* and *Cuyahoga Power Co. v. Northern Realty Co. et al., supra.* In these cases the court examined the record to ascertain whether there was an independent ground upon which the state court decision would be upheld, and if so, the jurisdiction of this court would not attach.

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Eustis v. Bolles, 150 U. S. 361, 366.

"Although it does not seem, from the report of this case in the Missouri Reports that the point taken before us was raised or passed upon by the Supreme Court of that State, yet being found in the record, and arising out of the transactions at the trial, as exhibited in the bill of exceptions, it is our duty to examine it. * * *."

Klinger v. State of Missouri, 13 Wall. 257, 261.

"The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or

treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction."

Klinger v. Sta of Missouri, supra, page 263.

In *Johnson v. Risk,* 137 U. S. 300, the record showed that, in the supreme court of Tennessee, two grounds of defense had been urged, one of which involved the construction of the provisions of the federal bankrupt act of March 2, 1867, and the other the bar of the statute of limitations of the state of Tennessee; and this court held that where, in an action pending in a state court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the federal question; and if this does not affirmatively appear, the writ of error will be dismissed, unless the defense which does not involve a federal question is so palpably unfounded that it cannot be presumed to have been entertained by the state court.

The court said at page 307:

"Where there is a federal question, but the case may

have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court decided, we ought not to assume that it proceeded on grounds clearly untenable. *Klinger v. Missouri,* 13 Wall. 257. But where a defense is distinctly made, resting on local statutes, we should not, in order to reach a federal question, resort to critical conjecture as to the action of the court in the disposition of such defense."

In *Cuyahoga River Power Co. v. Northern Realty Co. et al.,* 244 U. S. 300, at page 304 it was stated:

"* * * But the rule which controls such a situation has long prevailed and was clearly expressed in *Allen v. Arguimbau,* 198 U. S. 149, 154-155, where a writ of error to the Supreme Court of Florida was dismissed, as follows: 'The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad, but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction. *Dibble v. Bellingham Bay Land Company,* 163 U. S. 63; *Klinger v. Missouri,* 13 Wall. 257; *Johnson v. Risk,* 137 U. S. 300.' *Bachtel v. Wilson,* 204 U. S. 36; *Adams v. Russell,* 229 U. S. 353."

In *Bachtel v. Wilson,* 204 U. S. 36, 40:

"But we are not called upon to decide which is the correct interpretation. The Supreme Court of a State is the ultimate tribunal to determine the meaning of its local statutes. We are not to assume that that which

seems more reasonable to us also seemed more reasonable to and was adopted by it. Before we can pronounce its judgment in conflict with the Federal Constitution it must be made to appear that its decision was one necessarily in conflict therewith and not that possibly, or even probably, it was. It surely is not unworthy of consideration that the legislature, having before it the question of punishment for offenses committed by banking officers, having made provision therefor by one section in which it used the term 'any banking company,' may have believed that thereby it had included in its punitive provisions all banking institutions, and that a repetition of that section in other statutes was unnecessary. We do not decide that this was so, but we do hold that in view of the silence of the Supreme Court we are not justified in assuming that it held that it was not so."

The opinion of the judge of the circuit court of Dane county, Wisconsin, indicates that this act is an elective act (T. R. 34), and also that the act is constitutional (T. R. 32, 3, 4, 5). It may be elective in two ways. The plaintiffs in error may use the land adjoining the stream obtaining necessary power through steam, or by coming under the act and obtaining water power permits. There is no interference with the use of the land. There is, furthermore, no obligation to use the water power, but if plaintiffs in error as riparians choose so to do, they shall comply with the terms of the act.

"A complete answer to this claim is found in the elective or voluntary character of the Wisconsin Compensation Act. That act provides that every employer who has elected to do so shall become subject to the act, that such election shall be made by filing a written statement with the commission which shall subject him to the terms of the law for a year until July 1st following and to successive terms of one year unless he withdraws. Wisconsin Stats. secs. 2394-3, 4, 5. It is conceded by the

counsel for the plaintiffs in error that the act is elective, and that it is so is shown by the decisions of the Wisconsin Court in *Borgnis v. Falk Co.*, 147 Wis. 327, 350, 37 L. R. A. (N. S.) 489, 133 N. W. 209, 3 N. C. C. 649, and in the present case, 185 Wis. 127, 200 N. W. 775. If the employer elects not to accept the provisions of the compensation act, he is not bound to respond in a proceeding before the Industrial Commission under the act, but may await a suit for damages for injuries or wrongful death by the person claiming recovery therefor, and make his defense at law before a court in which the issues of fact and law are to be tried by jury. In view of such an opportunity for choice, the employer who elects to accept the law may not complain that in the plan for assessing the employer's compensation for injury sustained, there is no particular form of judicial review. This is clearly settled by the decision of this court in *Hawkins v. Bleakly*, 243 U. S. 210, 216, 61 L. ed. 678, 684, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959."

Booth Fisheries Company et al. v. Industrial Commission of Wisconsin et al., 271 U. S. 208, 210.

One may not, upon electing to come under the act, assert the unconstitutionality thereof.

Booth Fisheries Co. et. al. v. Industrial Commission of Wisconsin et al., supra, and cases therein cited on page 211.

The answer does not raise estoppel as a defense. The Wisconsin rule is that when the pleadings show all of the facts out of which the estoppel arose, it is not incumbent upon the pleader especially to plead estoppel.

Bank of Antigo v. Ryan, 105 Wis. 37, 40;
Lawton v. Racine, 137 Wis. 593, 600;
Karlen v. Trickle, 189 Wis. 148, 153.

In the *Karlen* case, *supra*, the defense of estoppel was

not urged before the lower court. Yet, such claim was received by the Wisconsin supreme court as controlling therein.

The Wisconsin rule likewise is that one may not be heard to complain that an act under which he seeks advantages is unconstitutional.

State ex rel Kellogg v. Currens, et al, 111 Wis. 431

In the *Kellogg* case, *supra*, Kellogg the appellant, was the holder of a diploma from a Chicago medical school. Under the Wisconsin statutes, prior to the amendment, he would have been entitled to commence practice either upon production of the diploma which he held or upon passing examination. By an amendment both diploma and examination were made prerequisite to a license to beginners. Kellogg presented his diploma with the required fee. The board refused to grant him a license, insisting that he take an examination. He petitioned for and the court issued an alternative writ of mandamus. Kellogg thereafter appealed from an adverse decision of the lower court contending that the amending act was void, because it violated section 1, article I of the Wisconsin constitution and section 2, article IV and the 14th amendment of the federal constitution. The court stated on page 442:

> "* * * His only right to a certificate depends upon the validity, therefore, of a statute containing this provision, and he cannot be heard to assail its validity. *Hart v. Folsom* (N. H.), 47 Atl. Rep. 603. Were he being persecuted for practicing medicine without a certificate, he would be in a different situation."

In *Pera v. Shorewood, supra*, when plaintiff filed his claim with the Village of Shorewood for compensation for damages caused by the districting of the village, he

asserted the invalidity of the ordinance thereof. The claim as filed, contained this statement:

> "This claim is submitted and filed without prejudice to any of the rights and privileges of the claimant to contest the validity of said ordinance."

He claimed that the ordinance was unconstitutional; that the statute dedicating the power to the village to pass an ordinance dividing the village into districts was void. The court said, page 263:

> "This reservation may well preserve the right of the plaintiff to contest the validity of the ordinance in a proper proceeding, but it cannot have that effect in the proceeding now before us. As stated, the filing of the claim asserted the validity of the ordinance and the statute under which it was passed, otherwise the plaintiff could not contend that his claim had any validity. When he took his appeal to the circuit court from its disallowance by the village he did so as an aggrieved party, again asserting by his acts the validity of the ordinance. So he came into court relying upon the ordinance as the valid basis for his claim. Having instituted his action upon the sole basis of the validity of the ordinance, he cannot now seek to maintain it by asserting the invalidity of that which enabled him to come into court. This case is parallel with that of *Hurley v. Commission of Fisheries*, (U. S.) 42 Sup. Ct. 83, decided by the supreme court of the United States December 5, 1921, where it was held that a plaintiff could not claim under a statute and assail it in the same proceeding. To do so would enable parties to make use of a statute as a valid one during one stage of an action, and then, upon a certain point therein being reached, continue it upon the basis that it is invalid because from thence on it seems to be more advantageous to claim its invalidity. This is a species of legal somersault or suicide that courts will not tolerate. Parties cannot pursue two inconsistent remedies in the same action. 9 Ruling Case Law, 958."

There have been numerous adjudications in Wisconsin wherein one having received benefits under an act has been later estopped to deny the validity thereof. The foregoing citations, however, show that estoppel arises though the claimant has received no benefit and sets up the unconstitutionality of the act in proceedings from which he expects to derive advantages.

It is apparent from the complaint of plaintiffs in error and exhibits made a part thereof that they sought a permit to rebuild, operate, and maintain an existing dam, yet asserted that some of the conditions set out in the statutes with which they would have to comply to obtain the permits are unconstitutional. They are clearly estopped to so claim in Wisconsin, and this defense is adequate to sustain the decision of the lower court.

Estoppel, either by itself or accompanied by ground supporting a federal question, deprives this court of the power to disturb the judgment of the lower court.

Enterprise Irrigation District et al. v. Farmers Mutual Canal Co. et al., 243 U. S. 157, 163;
Hurley v. Commission of Fisheries, 257 U. S. 223, 225;
Kansas City, Memphis & Birmingham Railroad Co. v. Stiles, 242 U. S. 111, 117.

Estoppel may stand by itself, apart from that contention of unconstitutionality and conflict with due process clause, since the due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.

Sayward v. Denny, 158 U. S. 180, 186;
Central Land Co. v. Laidley, 159 U. S. 103, 112;
Castillo v. McConnico, 168 U. S. 674, 683-684;

Enterprise Irrigation District et al. v. Farmers Mutual Canal Co. et al., 243 U. S. 157, 163.

The question presented, to wit: Estoppel, aside from its relation to the validity of the lower court's adjudication turned upon the water power act, being elective, and upon the law of the state, in which event the decision of the state court is controlling.

Preston v. Chicago, 226 U. S. 447, 450;
St. Louis & Kansas City Land Co. v. Kansas City, 241 U. S. 419, 427;
Old Colony Trust Co. v. Omaha, 230 U. S. 100, 116.

The Wisconsin supreme court not having filed any opinion and it appearing from the record that the lower court considered the act elective which would thereupon render one estopped to claim under it and attack it in the same breath, the decision of the state court, though it appears that it discussed constitutionality, may stand on estoppel, even though a federal question may be involved.

In *De Saussure v. Gaillard*, 127 U. S. 216, 234, the general rule is stated:

> "* * * that to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. * * *"

These elements are lacking, and no federal question having been considered or decided and if considered, being unnecessary to the determination of the cause, the judgment as rendered shall stand.

In *In re Crawford County Drainage District*, 182 Wis. 404,

the Wisconsin Railroad Commission was called upon to determine whether the proposed drainage district would materially impair the navigability of or any other public right in any waters or streams that may be navigable. The commission, though the proof showed that the area to be drained—a large acreage of the Mississippi bottoms above Prairie du Chien, Wisconsin—consisted of ponds and sloughs, which had been meandered by the government, that the waters were navigable for small craft and in fact navigated by fishermen, hunters, and others, that a ferry plied between Iowa and Wisconsin, its course being in part through one of the large sloughs, and that the public rights of trapping, hunting, fishing, and navigation would not be totally destroyed, but damaged by the projected work, found that the proposed work would not materially impair any other public right in or public use of such waters or streams.

The lower court confirmed the preliminary report of the drainage commissioners, and directed them to proceed with the drainage project, thus effectuating the organization of the district. An appeal from that order was taken. The Wisconsin Supreme Court reversed that order and remanded the cause with directions to dismiss the proceedings for the establishment of such district, holding that navigable waters could not be destroyed for any drainage scheme.

It is interesting to note that this court thereafter denied the application of the proposed plaintiff in error for a writ of certiorari, refusing to take jurisdiction.

The questions involved were evidently considered state questions, lacking of a Federal nature, as sufficient though Federal questions were present, to sustain the decision of the state court.

See, *Crawford County Levee and Drainage District, etc., v. J. R. Hutson et al.*, 264 U. S. 598.

I.

The Fox River is a meandered navigable stream of the State of Wisconsin.

The Fox River in the township in which the dam of plaintiffs in error is located is a meandered navigable river. (1) The plaintiffs in error admit that the dam in question was constructed across the Fox River without legislative authority. The proceedings before the Railroad Commission of Wisconsin upon which the suit herein is based was in fact taken for the purpose of legalizing the dam under the statutes of Wisconsin.

II.

The erection of any dam, bridge or other obstruction over any meandered navigable stream, even though it does not interfere with navigation is a nuisance abatable as such.

The erection of any dam, bridge or other obstruction over any meandered navigable stream was prohibited by law from the earliest territorial days (1840) down to the present time. Such obstructions were declared to be nuisances subject to be abated as such by the state or any citizen. (2)

---

(1) Maps of Original Survey of Township 21 North of Range 17 East of the Fourth Principal Meridian in Northwest and Wisconsin Territories, signed by the Surveyor General on July 21, 1835 and December 31, 1844, respectively, on file in the office of the Commissioner of Public Lands at Madison.
Wisconsin et al. v. Fox River Paper Co., 82 Wis. 647.

In 1858, similar statutes prohibiting obstructions in all streams navigable in fact and providing a penalty for violation thereof, and giving a right of action for the recovery of damages to any persons injured by such offense were enacted. This is still the law. (3)

In an early case (1872) it was held that the erection and maintenance of a dam without legislative permission is unlawful, even though it does not interfere with navigation and in fact may prove to be a benefit to navigation. (4)

This has been the uniform ruling of the supreme court. (5)

III.

The state may authorize the erection of dams over navigable streams for public purposes, other than the improvement of navigation, as, for example, to provide a municipal water supply.

The state may, however, in the exercise of its jurisdiction grant permission to erect dams across navigable streams under such restrictions as will protect the public rights in public waters. (6)

Such authorization may be made for a public purpose other than the improvement of navigation, as, for example, to provide a municipal water supply. (7)

---

(2) History of State Legislation, the Appendix to this brief.
(3) History of State Legislation, the Appendix to this brief.
(4) *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61, 67.
(5) *Barnes v. Racine*, 4 Wis. 474;
In re Eldred, 46 Wis. 530;
Cross Co. v. Little Suamico, 74 Wis. 652.
(6) *Stoughton v. State*, 5 Wis. 291.
(7) *State v. Eau Claire*, 40 Wis. 533.

IV.

In the exercise, at least, of the public right to improve the navigation of a navigable stream, the state may without compensation to the riparian owner impair or totally destroy riparian rights.

Riparian rights are subordinate to public rights in navigable waters. It has at least been uniformly held that because of the public right of navigation in navigable waters riparian rights may be greatly restricted or totally destroyed by the exercise of the public right to improve the stream and that the riparian is not entitled to compensation for any losses resulting from such improvements. The following cases illustrate the proposition.

Plaintiff purchased frontage for the purpose of erecting a saw mill; the chief value of the land was accessibility to the river. Defendant authorized by the legislature to improve the navigation of the river constructed a line of piers, booms and piles along the river in front of plaintiff's land and completely appropriated and blocked up the river bed in front of plaintiff's land, rendering it impassable and unnavigable, except in a channel immediately in front of plaintiff's premises, through which the water was made to flow with increased velocity. The approach to plaintiff's land was rendered inaccessible for logs and lumber. Chief Justice Ryan held that the riparian right rests "in the absence of prohibition upon a passive or implied license by the public, is subordinate to the public use and may be regulated or prohibited by law. *Dietrich v. Railway Co.*, 42 Wis.248; *Stevens Point Boom Co. v. Riley*, 44 Wis. 295." (8)

---

(8) *Cohn v. Wausau Boom Co.*, 47 Wis. 314, 322 (1879).

Plaintiff acting under authority granted in 1864 to improve the navigation of the Black River crossed by a dam the entrance of Black Snake River, a navigable stream which diverged from the main channel of Black River and rejoined it at a point lower down. Defendant was organized by special act in 1872 for the purpose of manufacturing lumber in various forms and also to improve the navigation of Black River within specified limits. Defendant was also a riparian owner on Black Snake River and maintained in front of its banks booms, piers and rafting works. In order to restore the navigable character of Black Snake River, defendant tore down the dam at the entrance. Plaintiff's bill seeking to enjoin the defendant from further interfering with its dam was sustained. The court says:

"*The waters in a navigable river, or other navigable body of water, are so far the property of the state that the state may control them for public purposes, in their flow or otherwise, without making any compensation to the riparian owners upon the borders of such streams or bodies of water* (p. 681). * * * The right of the riparian owner to have the water of a navigable stream flow past his lands adjoining the same as they were accustomed to flow, is as perfect against everybody except the state, or some person or corporation standing in its stead, as it is in the case of unnavigable streams; and that right does not, as this court has decided, depend upon his ownership of the soil under the water, but upon his riparian ownership; and the right of the state to control the waters of such streams in the public interest is the same whether the ownership of the soil under the water be in the state or in the riparian owner. * * * And, as against the state, or the plaintiff acting in its stead, we think this court has determined that the riparian owners on the banks of the Black River, or the Black Snake River, have not the absolute right to have the

waters of said river flow as they were accustomed to flow in front of or through their lands." (p. 682) (9)

Plaintiff built a dam under legislative permission. Afterwards the defendant was authorized to improve the navigation of the river and to build flooding dams. By reason of a dam fourteen miles above plaintiff's dam, the water was held back and let out periodically so as greatly to impair the plaintiff's water power. Plaintiff's bill was dismissed, the court holding that the Oconto River being a navigable stream and a public highway the legislature could legally authorize the improvement thereof by the construction of flooding dams in such stream in aid of navigation, and that owners of mill dams built across the stream under prior statutory authority have no right of action for any impairment of the efficiency of their water powers resulting from the proper use of such flooding dams. (10)

V.

Public rights in navigable waters are not limited to navigation but include the right of fishery, the right of taking ice, the development of the river for municipal water supply and for all beneficial public purposes.

The scope of the public right of use is not merely limited to navigation.

In the early case of *Wisconsin River Improvement Co. v. Lyons,* 30 Wis. 61, it was held that the dam was a nuisance, irrespective of whether it interfered with navigation. It must have been held that the public right extended beyond the use of the stream for navigation.

---

(9) *Black River Improvement Co. v. La Crosse, etc., Co.,* 54 Wis. 659, 681, 682 (1882).

(10) *Falls Manufacturing Co. v. Oconto Co.,* 87 Wis. 134, 150, 151 (1894).

In *Willow River Club v. Wade* (11), which involved the question whether to take fish out of a public stream comes within the scope of public rights in such waters, Judge Marshall in concurring in the decision, says:

> "Though such title (that is, the soil beneath the rivers) by force of state policy has passed from it to private ownership, such ownership is of such a qualified character as not to in any way interfere with the character of the streams as public waters; not public in the sense of such rivers as at common law were merely subject to the right of passage, but public by the common law test of navigability." (p. 104)

In other words, even though the technical title to the bed is in the riparian owner, yet such waters have lost none of the incidents of public waters at common law.

In Wisconsin, the title to the beds of lakes is vested in the state (*McLennan v. Prentice*, 85 Wis. 427, 442; *Priewe v. Wisconsin State L. & I. Co.*, 93 Wis. 534, 546) and the court, commenting, says:

> "The title of the state to submerged lands under navigable waters, whether lakes or rivers, came to it at the same time subject to the same incidents, and for the same purposes, and must necessarily be governed by the same rules." (pp. 113, 114) (12)

In *Rossmiller v. State*, it was held that the taking of ice is a common right in navigable lakes.

It may be stated generally that the scope of public rights in public waters has never been exhaustively determined in Wisconsin. In general, it includes all rights at common

---

(11) 100 Wis. 86, 104.
(12) 100 Wis. 86, 113-114.

law in navigable waters (13), and particularly the right of navigation. (14) It also includes fishing. (15) Also taking of ice. (16)

It would seem to include the right to use water by a municipality for domestic water supply. (17)

Nowhere has it been decided that the public use does not include the use of navigable waters to develop power for public purposes.

In *Black River Improvement Co. v. La Crosse, etc., Co.* 54 Wis. 659, the court says (pp. 680, 682):

> "In *McKeen v. Delaware Division Canal Co.*, 49 Pa. St. 424, it is held that 'every one who buys property upon a navigable stream purchases subject to the superior rights of the commonwealth to regulate and improve it for the benefit of all her citizens. If, therefore, he chooses to place his mills or his works, for the qualified use he may make of the water, within the limits or influence of high water, he does so at his own risk, and cannot complain when the commonwealth, for the purpose of improvement, chooses to maintain the waters of the stream at a given height within its channel.' The same doctrine of the right of the state to control the navigable waters of the state, without liability for damages, is held in the following cases in that state: *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Susquehanna Canal Co. v. Wright*, 9 W. & S. 9; *Monongahela Bridge Co. v.*

---

(13) *Willow River Club v. Wade*, 100 Wis. 86;
Pewaukee v. Savoy, 103 Wis. 271, 274;
Illinois Steel Co. v. Bilot, 109 Wis. 418, 425;
Rossmiller v. State, 114 Wis. 169, 186.

(14) *Jones v. Pettibone et al.*, 2 Wis. 225, 235 (1853);
Boom Co. v. Reilly, 46 Wis. 237, 243;
Cohn v. Boom Co., 47 Wis. 314, 325;
Black River, etc., Co. v. La Crosse Co., 54 Wis. 659, 680, 681, 682.

(15) *Willow River Club v. Wade*, 100 Wis. 86, 97, 99, 101, 102, 104;

(16) *Rossmiller v. State*, 114 Wis. 169, 186, 187;

(17) *Attorney General v. Eau Claire*, 40 Wis. 533, 540, 541.

Kirk, 46 Pa. St., 112; and many other decision of the courts of that state hold the same doctrine.

"In the case of *Fitchburg Railroad Co. v. Railroad Co.,* 3 Cush. 58-88, Chief Justice Shaw says: 'It is incident to the power of the legislature to regulate a navigable stream so as best to promote the public convenience; and if, in doing so, some damage is done to riparian proprietors, and some increased expense thrown upon them, it is *damnum absque injuria.*' * * * These cases and many others hold the doctrine that the waters in a navigable river, or other navigable body of water, are so far the property of the state that the state may control them for public purposes, in their flow or otherwise, without making any compensation to the riparian owners upon the borders of such streams or bodies of water. * * *.

"* * * Whether this court has decided or will decide that the state may, for any and all public purposes, interfere with the waters of a navigable stream, whereby injury may result to the riparian owner, without making compensation therefor, need not be determined in this case."

Let us refer again to the case of *Willow River Club v. Wade,* 100 Wis. 86, as indicating that navigable waters in Wisconsin are public not only for navigation but for other public uses. Judge Marshall, in concurring with the opinion of the court, says this (103-104):

"I concur with the decision of the court, but regard the opinion of the Chief Justice as being so framed as to lead to the belief that the common right of fishing in this state is a mere incident to the right of navigation and that defendant is not liable because he was navigating the stream in a boat at the time of the act complained of, in short, that he was where he had a right to be in the exercise of the right of navigation and therefore that he was not a trespasser upon the plaintiff's lands. In my judgment the right of fishing in navigable waters is common to all and exercisable so far as it can be done

without trespass on the banks thereof, whether the person exercising such right be at the time navigating the stream in a boat or otherwise floating upon the surface of the water or traveling upon the bed in the shallows or anywhere in any manner between the lines of ordinary high-water mark."

In the early days the streams of Wisconsin were used merely for navigation and the floatage of logs. The greater number of dams were constructed for the improvement of navigation and to facilitate log driving. In recent years, after the timber was cut and the lands developed, dams were more frequently built for the purpose of developing power. The many special acts of the legislature authorizing the construction of dams were ostensibly to improve the navigability of the river but were in fact for the purpose of developing power. This probably explains the lack of extensive judicial discussion of other public rights in public waters. The state holds the navigable waters in its sovereign and governmental capacity for all public uses. It would seem that to develop a stream for the purpose of power falls within the public right of use of navigable streams, and is superior to the rights of riparian owners.

VI.

The undeveloped power of a navigable stream is not a riparian right. The energy of falling water when developed by the erection of a dam is appurtenant to the dam and not to the riparian lands. The dam may only be constructed by the state or under the authority of the state. The energy of falling water developed by means of a dam, if it is capable of ownership, must vest in the state; hence it follows that the energy so developed has its source in either (1) *something not capable of ownership and therefore no one's property, or* (2) *the property of the state.*

The defendant in error contends that the undeveloped

power is not a riparian right. Even though it be admitted for the sake of argument that the improvement of navigable water for the purpose of creating hydro power is not a public use, superior to riparian rights, the plaintiff in error could not claim compensation for the undeveloped power for the following reasons:

That the energy in falling water in a navigable stream is not a riparian right;

That developed power is appurtenant to the dam and not to the riparian lands;

That a dam may be constructed only by the state or under the authority of the state;

That the dam makes available the energy of falling water and that the energy so developed has its source, therefore, in either (1) something not capable of ownership and therefore no one's property, or (2) the property of the state;

That since the dam can be constructed only by the state itself, or under the authority of the state, and since the power which is appurtenant to the dam is taken from no private owner but is contributed by the state itself, which, together with the grant to build the dam is a material contribution to the developed power, the state may attach such terms and conditions to its franchise as it will.

VII

The proposition that the energy in falling water in a navigable stream is not a riparian right was squarely presented in *United States v. Chandler-Dunbar Company*, 229 U. S. 53. An act of Congress provided that all lands and property on the St. Mary's river in the State of Michigan should be taken by the Secretary of War, either by condemnation or purchase, for improving the navigation of the river. By the laws of Michigan, as in Wisconsin, the

technical title to the bed of a navigable river is in the riparian owner. The Chandler-Dunbar Company claimed that the undeveloped water power of the river in excess of the supposed requirements of navigation is a riparian right. The District Court of the United States upheld this contention and awarded $102,000 for the upland taken and $550,000 for the undeveloped water power.

The United States Supreme Court, on appeal, held that the company had no private property in the water capacity of the rapids and falls of the St. Mary's River and disallowed the claim in toto.

The claim was made in that case, as is contended here by plaintiffs in error, that although the right of navigation is dominant, yet that the United States may not exclude the rights of riparian owners to construct in the river and upon their own submerged lands such appliances as are necessary to control and use the current for commercial purposes, provided only that such structures do not impede or hinder navigation and that the flow of the stream is not so diminished as to have less than every possible requirement of navigation, present or future.

The court said:

"This claim of a proprietary right in the bed of the river and in the flow of the stream over that bed to the extent that such flow is in excess of the wants of navigation constitutes the ground upon which the company asserts that a necessary effect of the act of March 3, 1909, and of the judgment of condemnation in the court below, is a taking from it of a property right or interest of great value, for which, under the Fifth Amendment, compensation must be made." p. 61.

"* * * This title of the owner of fast land upon the shore of a navigable river to the bed of the river, is at best a qualified one. It is a title which inheres in the ownership of the shore and, unless reserved or excluded by implication, passed with it as a shadow follows a

substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers." p. 62.

And on page 66:

"But the flow of the stream was in no sense private property, and there is no room for a judicial review of the judgment of Congress that the flow of the river is not in excess of any possible need of navigation, or for a determination that if in excess, the riparian owners had any private property right in such excess which must be paid for if they have been excluded from the use of the same."

On page 69, the court gives the reason why the undeveloped power does not constitute private property right:

"It is a little difficult to understand the basis for the claim that in appropriating the upland bordering upon this stretch of water, the Government not only takes the land but also the great water power which potentially exists in the river. The broad claim that the water power of the stream is appurtenant to the bank owned by it, and not dependent upon ownership of the soil over which the river flows, has been advanced. But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows or the ownership of land bordering upon the river, is of no prime importance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable.

"Whatever substantial private property rights exist in the flow of the stream must come from some right which that company has to construct and maintain such

works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes. We may put out of view altogether the class of cases which deal with the right of riparian owners upon a non-navigable stream to the use and enjoyment of the stream and its waters. The use of the fall of such a stream for the production of power may be a reasonable use consistent with the rights of those above and below. The necessary dam to use the power might completely obstruct the stream, but if the effect was not injurious to the property of those above or to the equal rights of those below, none could complain, since no public interest would be affected. We may also lay out of consideration the cases cited which deal with the rights of riparian owners upon navigable or non-navigable streams as between each other. Nor need we consider cases cited which deal with the rights of riparian owners under state laws and private or public charters conferring rights. That riparian owners upon public navigable rivers have in addition to the rights common to the public certain rights to the use and enjoyment of the stream which are incident to such ownership of the bank, must be conceded. These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. Among these rights of use and enjoyment is the right, as against other riparian owners, to have the stream come to them substantially in its natural state, both in quantity and quality. They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore. But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in the exercise of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river. *Gibson v. United States*, 166 U. S. 269; *Transportation Co. v. Chicago*, 99 U. S. 635. It is for Congress

to decide what is and what is not an obstruction to navigation; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421; *Union Bridge Co. v. United States*, 204 U. S. 364; *Philadelphia Co. v. Stimson*, 223 U. S. 605."

VIII.

The developed power is appurtenant to the dam and not to the riparian lands.

In *Smith v. Ford*, 48 Wis. 115 (1879), it was held in effect that power developed by a dam created by legislative authority is appurtenant to the dam and not appurtenant to the riparian lands. In this case the original owners of the lots on a navigable stream built a dam, which raised a head of water in the stream. Later they sold and leased the right to use water from the dam to various persons who on behalf of themselves and their heirs covenanted to contribute to the maintenance of the dam in proportion to the amount of water furnished and undertook to maintain the dam forever, but the deed conveyed no other interest in the adjoining lots.

Still later, the owners conveyed the lots upon which the dam abutted on one end.

It was held on p. 168 that there was a severance of the ownership of the dam itself and the power created thereby from the mere ownership of the lots and that the grantee of the lot, as riparian owner, had no right to the water power.

Commenting, the court says: "It appears that the owners of lot 2, block 40, and the lands adjoining the river on the east side thereof where the dam is now situated obtained from the state a right to construct a dam across the river at that point for hydraulic purposes and to sell and lease the right to use the water from such dam. Would this grant from the state owners of said land, though owning the soil under the river, had no power to construct the dam thereon." (p. 168)

In *Lawson v. Mowry*, 52 Wis. 219 (1881), the courts says, on page 237:

"It was the legislature which gave the authority to obstruct the channel of the river by the building of the dam and canal, and to make use of the water power thereby created for navigation, and the surplus for hydraulic purposes. The water power thus created by the dam was not necessarily confined to the use of it at the dam. It is common to conduct water from a pond created by a dam by means of artificial channels, in order to make available the increase of the head by reason of the additional fall in the bed of the stream below the dam. The embankment or land between such artificial channel and the bed of the stream is, nevertheless, as necessary to preserve the water power as the dam itself. It is, in effect, nothing less than a wing of the dam. The canal, down as far as the lock, is in effect nothing less than an enlargement or arm of the pond created by the dam. It is the fall of the water which gives the power, and the power which gives the value for hydraulic purposes. The right to create and maintain the power, as well as the canal, was authorized by legislative grant to Doty, Reeds and their associates; and, to be rightfully enjoyed by others, it must be derived from them or some of them.

"By means of the dam, canal, embankment and lock, the power derived from the surplus water could be made available at the lots in question by means of an artificial channel; but the right to create such channel and use such power at the lots was not derived exclusively from the ownership of the lots themselves, but reached back to the authority to create and maintain the dam, canal and lock, and to use the surplus water for hydraulic purposes."

In an early case *Wall v. Cloud*, 22 Humphreys' Report 181 (Tenn.) (1842), it was held that where Cloud conveyed by deed to Wall the ground on which the abutment of a dam stood with all and singular the rights and privileges

thereto belonging that the deed conveyed not only the ground on which the abutment stood but also the entire and exclusive use of all water power created by the erection of the dam.

IX.

The state being in a position where it can either deny or grant a permit to construct, operate and maintain a dam whereby the water power capacity of the stream which does not belong to the riparian owner may be utilized, may impose conditions under which the right to erect the dam may become effective, and as one of these conditions may insist that the grantee of the permit sell the development on a basis of value, which is determined in advance of the granting of the permit. In granting a permit the state grants a franchise and exacts as conditions for such grant the right to purchase the development.

The state, because of its interest in the stream and its right to refuse permission for the erection of the dam, stands in a commanding position for bargaining with the owner of the upland. Relatively it stands in the same position as the owner of the upland would, should the state approach him and offer to buy the upland. The owner could refuse to do so. . In like manner the state is not required to grant the license to erect the dam. Being in that position, it can impose the terms under which it will grant the right, just as the municipality dealing with a public service corporation may impose the terms and conditions under which it will grant a franchise for the use of the public street. The Wisconsin statute outlines the terms and conditions under which the grant will be made. One of these terms provides that the grantee of the permit shall consent to a recapture of the development by the state at the end of thirty years and

stipulates the method whereby the compensation to the grantee shall be determined. By the method of determination provided for in the statute, the parties are doing no more than persons contracting with each other do when they fix and establish the damages for a breach of a contract or fix the price of property in an option that may be exercised in the future. In either instance the actual damage, or the actual value may or may not be greater at the time of taking, but the parties desiring definiteness and certainty in their contract, may agree to fix this item at the time that the other terms of the contract are agreed upon. This is exactly the situation of the state and the proposed grantee. Neither can tell whether the development will be more valuable or less valuable thirty years from that date. The state relinquishes a valuable right, and in consideration thereof demands that it may recapture and repurchase the development which it authorizes and to which it contributes. In order that it may know what its rights are, it also imposes a further condition upon the contract, that the method of determining the value of the development at that time shall be fixed and certain. The owner of the upland has the option to accept the terms which the state offers for its protection or to refuse to accept them, just as a utility corporation proposing to enter a city has the option of accepting the franchise tendered by the city, or of rejecting it. In either case, a valid contract may be entered into, which becomes binding on both parties. *Superior Water Co. v. Superior*, 263 U. S. 125, at 134 and 135 and cases there cited. Nor is this provision unfair for it insures to the grantee of the permit compensation upon an agreed basis if the state should not desire to extend the permit beyond thirty years, as it might. The provision requires the state either to permit the operation of the development beyond the thirty years

or to compensate the grantee for the development. If the purchase feature were not incorporated in the statutes, and the statutes only allowed a thirty year period, then it would mean that at the end of thirty years, when the permit had expired, the state could direct the grantee to remove the dam. Under such circumstances he would suffer great loss, the value of his development would be destroyed, and the value of the upland depreciated. In place of this, however, the state, in effect, says rather than require you, the grantee, to do so, it reserves the option to purchase the development at a figure which shall be specified in the contract. Such a contract is entirely fair, and certainly not open to any constitutional objections.

X.

The cases cited by the plaintiff in error do not sustain the propositions for which they are cited.

The cases cited on page 10 of the brief of plaintiffs in error which they claim sustain a rule that the undeveloped water power is a property right as against the state does not uphold such contention. We will discuss these cases in their order.

The Fox River Flour and Paper Co. v. Kelley et al., 70 Wis. 286 (1887). This case deals only with the rights of riparian owners upon a navigable stream, as between each other. In 1849, L and S were the owners of a wing dam on the north side of the Fox river at Appleton, from which wing dam a canal was constructed parallel to the river for a distance of some 1200 feet through block 14. The defendant is the owner of lot 8 in block 14 and claims title through his remote grantor S. The plaintiff is the owner of the said wing dam and all other structures necessary to develop the power and the canal. Plaintiff claims title through its remote grantor L. The defendants claim

to be entitled to use the flowing water in the canal for the purpose of driving the machinery of his mill.

The sole question in this case is whether the defendant has any rights to the water in the canal by reason of the fact that he owns the land through which the canal runs.

It is undisputed that after the wing dam and works and canal had been completed by an agreement between L and S, that L took all of the works and S took block 14.

After stating certain elementary doctrines, among which is the doctrine that "every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, without diminution or alteration," the court says (p. 294):

> "That defendants as riparian proprietors only have the right to the natural flow of the water of the river by their lot; also, as incident to their ownership of the lot, they have the right to utilize any fall in the stream in its natural state, as it passes by their lot, for the purpose of a water power. This is the full extent of their rights as riparian proprietors owning the lot on the river below the water power."

The court then holds that the ownership of the land does not give defendants any rights to the water power developed by the dam. (p. 305)

Green Bay and Mississippi Canal Company v. Kaukauna Water Power Co., 70 Wis. 635 (1887), and the same case on appeal in 142 U. S. 254 (1891), deals with a situation where the plaintiff became the owner of the surplus power created by a dam which is a part of the work of improving the navigation of the Fox river, undertaken by the State of Wisconsin. The controlling works and mill race are located on the north side of the river. The defendants are the owners of riparian lot 5, located on

the south side of the river, upon which the south end of the dam abuts, and extending from the end of the dam is an embankment on said lot 5 which confines the waters of the mill pond.

After the completion of the dam, defendants cut a canal on their own lands and threatened to cut the embankment also on their own land and draw water from the pond for hydraulic purposes for their own use, claiming to have this right as riparian proprietors.

The state Supreme Court says: (p. 649) "The controlling question is: Has the defendant the right to cut the embankment?"

The court then holds: That plaintiff owns all of the surplus water power created by the improvement. (p. 651) That by the legislative act, the defendant was deprived of all water power created by the dam. (p 651)

That by the construction of the dam the defendant was deprived of riparian rights for which it was entitled to compensation. (p. 653)

What such rights are, was not before the court and was not determined.

On p. 656, the court says that under the act of March 3, 1875, the defendant might claim compensation; that it still has a valid claim which "we think includes any deprivation or interruption of any legal riparian rights."

The scope of the decision of the Supreme Court of the United States is no broader than the decision in the state court. The sole question was whether the legislative act reserved to the state the water power created by the dam, and whether the proceedings thereunder operated to deprive defendant of property without due process of law. The court, in 142 U. S. on p. 272, says:

"That the owner of lot 5 was entitled to compensation for the land appropriated by the state in the construc-

tion of the dam and of the embankment in front of the lot. To what extent he was entitled to the use of the water power created by the dam as against the public and other riparian owners may be difficult of ascertainment, depending, as it does, largely upon the number of proprietors, the width and depth of the river, the volume of the water, the amount of fall and the character of the manufactures to which it was applicable. Nor is it necessary to answer the question in this case, since it appears that, whatever this property is, it has been appropriated and no provision made for the compensation of the owner."

It will be noted, however from the foregoing language that the court did not intend that the riparian owner was to be compensated for any undeveloped water power as is demonstrated by the language of the court on page 273 of the opinion.

"The value of this water power created by the dam was much greater than that of the river in its unimproved state in the hands of the riparian proprietors who had not the means to make it available. These proprietors lost nothing that was useful to them, except the technical right to have the water flow as it had been accustomed and the possibility of their being able some time to improve it. If the state could condemn this use of the water with the other property of the riparian owner it might raise a revenue from it sufficient to complete the work which might otherwise fail."

"There was every reason why a water power thus created should belong to the public rather than to the riparian owners. Indeed, it seems to have been the practice, not only in New York but in Ohio, in Wisconsin, and perhaps in other States, in authorizing the erection of dams for the purpose of navigation or other public improvement, to reserve the surplus of water thereby created to be leased to private parties under authority of the state."

And again on page 276:

"So far, however, as land was actually taken for the purpose of this improvement, either for the dam itself or the embankments, or for the overflow, or so far as water was diverted from its natural course, or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation."

On page 277:

"Inasmuch as the dam abuts upon this lot, its owner was doubtless entitled to compensation for the land occupied by the dam and embankment, as well as for the value of the use of the water diverted from its natural course."

On p. 281 the court says that the water power company claimed to be entitled to one-half of the water created by the improvement "and that too without reference to the riparian rights properly appurtenant to lot 5 *before the improvement was made,* or to any particular fall from the upper to the lower corner of such lot. It is difficult to see how, under these circumstances, this claim can be sustained."

P. 282: That to allow such claim "would savor strongly of an appropriation of public property for private use."

A. C. Conn. Co. v. Little Suamico Lumber Mfg. Co. et al., 74 Wis. 652 (1889), the contest is only between the parties to the action, who are both lumbermen using the stream for the floatage of logs and of whom both are maintaining mills upon the stream.

The question involved was whether the stream was floatable during certain seasons and therefore a public highway. It was admitted that the stream was small and crooked

and not capable of more extended navigation. One of the questions submitted was whether the dams in question were an aid or a hindrance to the floatability of the stream. The court held that a distinction may well be made between floatable streams and streams of a more extended and constant navigation. The court further held that Section 1596 of the statutes applied only to meandered navigable streams and that under Section 1598, Statutes, and Chapter 224, Laws of 1881 (quoted at pp. 53-54 of this brief) a navigable stream which does not fall within the class mentioned in Section 1596, Statutes, may be obstructed without legislative permission, provided only that such obstruction does not impair the free navigation thereof.

In the instructions to the jury which are approved, the court said: "The real test is, was the river made less beneficial and available to the plaintiff in the years stated, for getting down its logs, in consequence of this dam?" p. 662. "Their rights were equal, so far as the floatage was concerned, and their rights to floatage and maintenance of mill dams were to be exercised with due regard to the rights of each other." p. 663.

"Such interruptions in the flow of the water, either by dams, piers, booms, ponds, sluiceways, and chutes for sluicing, as is reasonable and unavoidable by the reasonable and proper use of the mill of the defendants, and consistent with a like reasonable and proper use by the plaintiff and the public, cannot be the subject of an action." (p. 666)

The jury found that the dams did not interfere with the floating of logs. The stream according to maps appears to have a drainage area of less than 50 square miles. The mill dam act was passed in 1840 (Act No. 48, Laws 1840). It refers only to non-navigable streams. Streams were not then generally used for log driving. Hence when in later

years the logging industry made use of streams capable of floating logs during the spring freshet, such streams were declared public highways. The court, however, thereafter took the position (*Allaby v. Mauston Electric Co.,* 135 Wis. 345 (1908), that when the mill dam act was adopted the legislature could not have had in contemplation merely floatable streams and held that the Lemonweir River having a drainage area of 550 square miles is a non-navigable stream under the mill dam act.

Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co. et al., 75 Wis. 385 (1890), is a case which involves merely the rights of the parties to the flow of the stream. It does not deal with the question whether power created by the construction of a dam constitutes a riparian right. The sole question involved was whether the canal company which owns the surplus power by an act of the legislature is "legally bound to return the surplus water to the river substantially at or near the dam and thus enable the plaintiff as such riparian owner to have its share of the use thereof while passing the rapids in a body, or whether the canal company may rightfully convey such surplus in the canal to points at so great a distance below the dam before the same is returned to the river as to deprive the plaintiff of his share of such use while passing the rapids or a portion of them." (p. 391)

Kimberly Clark Co. v. Hewitt et al., 79 Wis. 334 (1891). The controversy relates only to riparian rights between the plaintiff and defendants. The plaintiff owned both sides of the Fox River and erected a dam for the improvement of navigation by authority of the state across the river on its lands and received from the state the surplus water power created by the dam.

The defendant was an upper riparian owner on one side of the stream and claim the ownership of one-half of the surplus power not needed for navigation and threatened to divert one-half of the water of the stream by means of a canal around the plaintiff's lands and discharged the same into the stream below the plaintiff's premises.

Held, that the defendant had no such right "even though it were held that the plaintiff is not the owner of the surplus water power created by the dam. The rule is elementary that, unless affected by license, grant, prescription, or public right, or the like, every proprietor of land on the bank of a stream of water, whether navigable or not, has the right to the use of the water, as it is wont to run, without material alteration or diminution; and no riparian owner has the right to use the water of the stream to the prejudice of other riparian owners above or below him by throwing it back on the former or subtracting it from the latter. *Lawson v. Mowry*, 52 Wis. 219, and cases cited in the opinion by Mr. Justcie Cassoday." (p. 337)

The court further says that it was held in 70 Wis. 635, after much deliberation, that the canal company is the owner of such surplus water power; that the correctness of that ruling is vigorously challenged but that only one argument urged by them will be noticed. "They maintain that the act of congress of 1875, ch. 166 (considered in the *Kaukauna Case*, and which was repealed in 1888) did not, while in force, supply any adequate means of obtaining compensation for injuries to property caused by the improvement. We think otherwise. We understand that ch. 166 gave a right of action in the state courts against the United States to ascertain the amount of such compensation, and we cannot doubt that it pledges the faith of the government to pay all damages so ascertained. It cannot be presumed that the government will violate its obliga-

tions in that respect. So we are of the opinion that the act of 1875 furnished an adequate mode for obtaining compensation for such injuries." (p. 338)

NOTE: There is no suggestion anywhere in this case, what was included in the property taken from the defendants.

West et al. v. Fox River Paper Co., 82 Wis. 647 (1892). This case involves the relative rights of riparian owners on the Fox River. Both the plaintiff and the defendants own wing dams in the Fox River at the head of Grand Chute Island. The plaintiff, West, owned riparian lands on the south side of the north channel and lands on both banks of the south channel, the island being between the north and south channel. He cut away a portion of the head of the island to put in walls and works to make water available in a canal which was dug through the length of the island.

In 1877 a voluntary association built the Cross dam in the river. The claim of the plaintiff is that he owns three-fifths of the water power created by the dams and the defendant claims that it owns one-half of the power formed by the dams. The only question involved in this case is the respective rights of the parties to the water power thus created.

The defendant's claim that the cutting away of the head of the island greatly enlarged the south channel thereby increasing the flow through the south channel, whereas the plaintiff claimed that the works erected in place of the cutting of the channel did not increase the flow into the south channel.

The Circuit Court on page 653 says: "There are really only two questions on which the judgment depends and they

are whether the defendant's power on the north side has been made available by them at a point opposite and below the head of the island in its natural state; and what proportion of the waters of the river naturally flow in the south channel and the south half of the north channel."

The court sustains the finding of the court below that the defendants' power was made available and their dam on the north side was at a point even with and opposite to a point below the west or upper end of Grand Chute Island, and also sustains the ruling of the court which holds that one-seventh of the natural flow of the river is appurtenant to and flowed through the south channel and six-sevenths was appurtenant to and flowed through the north channel, and therefore apportioned to the plaintiff four-sevenths and to the defendant three-sevenths of the water power.

On page 656 the court finds: "It follows, therefore, that the plaintiff is entitled to the natural flow of the south channel, where his dam is situated for hydraulic purposes, and the whole thereof, by reason of his being the owner of the island on one side, and of the mainland on the other."

The court also finds that he is entitled to one-half of the flow of the north channel.

Water Power Cases, 148 Wis. 124 (1911-1912). In these cases it was distinctly held that if power may be developed within the natural flow of the stream that then it is a riparian right, but any power which may only be made available by means of a dam or other obstruction is not a right which is appurtenant to the upland. The court on page 149 says:

> "The right of the riparian owner to use the water of the river on his own land within his boundary determined by ordinary highwater mark, for the purpose of

creating power or, as the act in question puts it, 'developing energy', returning the water again to the stream, is unquestionably a private right appurtenant to the riparian land. The idea of a legal ownership of the 'energy' of falling water by one who owns neither the water which falls nor the land the declivity of which causes the fall has been analyzed and criticised by counsel for relators. * * * It is conceded there is such a riparian right as the right to use the water for power, and also that this right is to be exercised in subordination to the public right of navigation and the necessary accessories of the latter. We say that if the exercise of this riparian right, in the judgment of the legislature, interferes with the public right of navigation, it may be forbidden. But as has been said by Judge Cooley in *Middleton v. Flat River B. Co.*, 27 Mich. 533: 'Each right should be enjoyed with due regard to the existence and protection of the other.' Or, as he says in *Buchanan v. Grand River & G. L. R. Co.*, 48 Mich. 364, 367, 12 N. W. 490: 'Each right modifies the other and may perhaps render it less valuable, but this fact, if the enjoyment of the right is in itself reasonable and considerate, can furnish no ground for complaint.' *Where the ownership of the bank is essential to the construction of a dam or the creation or development of a water power, the state* is as helpless to use, sell, or lease such right without the condemnation and compensation as the riparian owner is to intrude into the navigable stream without consent of the state. *It requires the concurrence of the riparian owner and the state in such case to make the water power efficient,* and this right of the riparian owner to refuse to concur and stand out for compensation, in the case mentioned, is a private property right and often gives to such land its chief value. The state may refuse its permission to the riparian owner to build a dam and may attach conditions to its consent, such as the height, strength, mode of construction, etc., of the dam, and perhaps other conditions, but it may not seize upon this right without compensation and use it or sell it or lease it to another. It cannot authorize the use and enjoyment

of this right by a person not a riparian owner for a private purpose without the consent of the riparian owner, not for a public purpose without condemnation and compensation to the riparian owner." p. 150.

In connection with the quoted language above, we direct the court's attention to the fact that the Supreme Court of Wisconsin throughout the opinion confined its discussion mainly to a criticism of the effort of the state to take from the owner of a developed dam the right and power to continue to enjoy it, and to appropriate the development to the use of the state or to such other persons as were authorized to appropriate it under the statutes there criticised.

XI.

If the Wisconsin Water Power Act is declared unconstitutional, the Federal Water Power Act will also fall.

The Federal Water Power Act of 1920 provides that the United States may at the end of fifty years recapture any water power developed under its license by paying therefor, generally speaking, the investment cost. It is obvious that this cost may not represent the value of the development at the time of taking fifty years thereafter.

Under the Wisconsin Act the state or a municipality may recapture under somewhat similar provisions. It is obvious that if the Wisconsin Act is held to be unconstitutional, the Federal Water Power Act must also be unconstitutional, because like the Wisconsin Act, it does not provide compensation for the increased value of the water power capacity of the stream.

XII.

CONCLUSION

As nearly as we can ascertain from the brief of plaintiff in error the position of the plaintiff in error is solely that the water capacity of a stream is a property right appurtenant to the upland and that the state does not allow compensation for any increase in the value of the undeveloped power of a stream at the time of issuing the permit and its value at the time of taking. They do not object to the state's method of determining the value of the other property taken, namely, dams, works, buildings and other structures or equipment used and useful under the permit at the time of taking.

There are two answers to this conclusion (1) that the public rights in public waters are not limited to the improvement of the stream for navigation but include all public rights, such as the taking of fish, ice, the development of a municipal water supply and the public right to develop power and that all riparian rights are subordinate to all public rights; and (2) that the water power capacity of the stream is not a riparian right and the riparian owner having no "vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river, and that the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland." *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 76.

The state in surrendering to the riparian owner a valuable right for the period specified in the statutes may fix as a condition the right to recapture the entire development upon terms fixed at the time of issuing the permit,

which in the instant case is payment for the entire development at the time of taking over, but without paying for that part of the development which never belonged to the riparian owner.

IT IS THEREFORE RESPECTFULLY SUBMITTED, That these proceedings should be accordingly dismissed.

JOHN W. REYNOLDS,
Attorney General,

T. L. McINTOSH,
Assistant Attorney General,

MICHAEL J. DUNN, JR.,
Assistant Attorney General,

ADOLPH KANNEBERG,
Member of the Railroad Commission of Wisconsin,
Attorneys for Defendant in Error.

APPENDIX

HISTORY OF STATE LEGISLATION

I

1840 Territorial Laws, 1840, Act No. 9:

"Section 1. That all rivers and streams of water in this territory in all places where the same have been meandered and returned as navigable by the surveyors employed by the United States Government are hereby declared navigable to such an extent that no dam, bridge or other obstruction may be made in or over the same without the permission of the legislature."

1849 Reenacted without change as *Ch.* 34, *R. S.* 1849.

1853 Renumbered to be *Sec.* 2, *Ch.* 34, and following proviso added:

"Provided, that nothing herein contained shall be construed so as to affect any act now in force granting to towns, or county boards or supervisors the power to erect, or authorize the construction of bridges across such streams."

1858 Renumbered to be *Sec.* 2 of *Ch.* 41, *R. S.* 1858, substantially without change.

1878 Renumbered to be *Sec.* 1596, *Stats.* 1878, with only verbal changes.

1911 Amended to read and provide as follows:

"Subsection (1). All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the Government of the United States and all rivers and streams meandered or nonmeandered which are navigable in fact for any purpose whatsoever are hereby declared navigable to the extent

that no dam, bridge, or other obstruction shall be made in or over the same without the permission of the legislature." . . .

"Subsection (2). Any dam, bridge or other obstruction constructed or maintained in or over any navigable waters of this state in violation of the provisions of this section is hereby declared to be a public nuisance and the construction of any such dam, bridge or other obstruction may be enjoined or its maintenance abated by an action at the suit of the state of any citizen."

Subsection (3) provides a forfeiture for violations.

Subsection (4) makes it the duty of the Railroad Commission to report violations to the Governor of the state. (Ch. 652, Laws of 1911)

1917 *Subsection* (1) *supra,* renumbered to be *Sec.* 30.01, *Stats.* 1917, and amended by adding "every dam not furnished with a slide, chute or other equipment prescribed by the (railroad) commission" to the classes of obstruction prohibited.

Subsection (3) *supra,* (consolidated with *Sec.* 1596—22, Subs. (1) and *Sec.* 1598, *Stats.* 1915), renumbered to be *Sec.* 31.23, and revised to read:

"(1) Every person or corporation that shall obstruct any navigable waters and thereby impair the free navigation thereof, or shall place therein or in any tributary thereof any substance whatever that may float into and obstruct any such waters or impede their free navigation, or shall construct or maintain, or aid in the construction or maintenance therein of any bridge, boom or dam not authorized by law, shall forfeit for each such offense, and for each day that the free navigation of such stream shall be obstructed by such bridge, boom, dam or other obstruction, a sum not exceeding fifty dollars. But the floating or movement of logs or timber in navigable waters, or the necessary use of temporary booms in the course of such

floating or movement shall not incur such forfeiture."

"(2) Every person or corporation violating any of the provisions of this chapter, other than those mentioned in subsection (1) of this section, or violating any order made by the commission pursuant to any provision of this chapter, shall forfeit for each such violation not more than one thousand dollars."

Subsection (4) consolidated with *Sec.* 1596—22, Subs. (2), renumbered to be *Sec.* 3124, *Stats.* 1917, and revised to read:

"(1) It shall be the duty of the commission to report to the governor every forfeiture incurred under subsection (1) of section 31.23 and every nuisance committed in violation of section 31.25 and the governor shall thereupon cause the attorney-general, or some other person duly authorized by the governor to act instead of the attorney-general, to institute proceedings to recover such forfeiture or abate such nuisance.

"(2) It shall be the duty of the attorney-general, when so requested by the governor, and otherwise the duty of the district attorney of the proper county, to institute proceedings to recover any forfeiture incurred under this chapter other than those specified in subsection (1) of section 31.23.

"(3) All such forfeitures shall be recovered by civil action as provided by chapter 142 of the statutes and when collected shall be paid directly into the state treasury."

Today These statutes now bear the same section numbers as last above given, being *Sections* 30.01, 31.25, 31.23, and 31.24 respectively, *Stats.* 1925, and contain no subsequent changes.

II.

1853 *Sec.* 1, *Ch.* 34, *Rev. Stats.*

"Section 1. The river Mississippi, and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of the state, as to the citizens of the United States, without any tax, impost or duty therefor: Provided, that nothing herein contained shall prevent the collection of all tolls imposed for necessary easements, constructed in the said navigable waters."

1858 Renumbered to be *Sec.* 1, *Ch.* 41, *R. S.* 1858; substantially no change.

1878 Omitted from statutes by revisor "as being sufficiently sanctioned by its enactment in the constitution."

III.

1853 *Sec.* 3, *Ch.* 34, *Rev. Stats.*

"Section 3. The boundaries of lands adjoining waters, and the several and respective rights of individuals, the state, and its citizens, in respect to all such lands and waters, shall be determined in conformity to the common law, so far as applicable as evidenced by judicial determinations in other states, in which the courts in such cases have adhered to its principles: Provided, That the provisions of this section shall have no effect in the determination of causes now pending in any of the courts of this state."

1858 Renumbered to be *Sec.* 3, *Ch.* 41, *R. S.* 1858.

1878 Renumbered to be *Sec.* 1597 and amended to read:

"The boundaries of lands adjoining waters and the rights of the state and of individuals in respect to

such lands and waters shall be determined in conformity to the common law as far as applicable."

1917 Renumbered to be *Sec.* 30.10.

1919 Renumbered to be *Sec.* 30.01, *Subs.* (4), *Par.* (*d*).

Today In effect unchanged, as *Sec.* 30.01, *Subs.* (4), *Par.* (d).

IV.

1858 *Sec.* 112, *Ch.* 41, *R. S.* 1858.

"Section 112. Whoever shall obstruct the navigation of any river or stream, which now is, or hereafter may be made, navigable, by falling any tree therein, or putting into any river or stream, declared a public highway, any refuse lumber, slabs, or other waste materials, on conviction thereof, shall forfeit the sum of five dollars for any such offense; and shall be further liable for all damages that may accrue on account of such obstruction."

1878 Renumbered to be *Sec.* 1598, and amended to read:

"Every person who shall obstruct any navigable stream in any manner so as to impair the free navigation thereof, or place in such stream or any tributary thereof any substance whatever, so that the same may float in or into, and obstruct any such stream or impede its free navigation, or construct or maintain, or aid in the construction or maintenance of, any boom not authorized by law, in any such navigable stream, shall forfeit for each such offense, and for each day that the free navigation of such stream shall be obstructed by such boom, twenty-five dollars; one-half to be paid to the person prosecuting. Every person damaged by such offense may sue for and collect such penalty, and in the same action may sue for and collect any special damage, sustained by him thereby, with costs. The verdict or finding, when for the plaintiff, shall state separately the amount of his special damages."

1917 Consolidated with *Sec.* 1596, *Subs.* (3) and *Sec.* 1596—22, *Subs.* (1) and revised as shown *supra.*

V.

1881 *Ch.* 220, *Laws of* 1881.

"Any person who shall materially obstruct the navigation of any river or stream in this state, used for the purpose of driving and floating saw-logs thereon, by banking or 'browing' logs therein, in such manner as to unnecessarily endanger or delay the passage of logs owned by other parties higher up on such stream, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than two hundred dollars, and in addition thereto, shall be liable for all damages sustained by other persons by reason of such obstruction and delay in driving and floating logs from points higher up on such stream."

1898 Repealed by *Ch.* 205, *R. S.* 1898.

VI.

THE MILL DAM ACT.

1840 The Mill Dam Act was enacted in 1840 as Act No. 48 by the Territorial Assembly for the purpose of authorizing the construction of mill dams in *non-navigable* streams. It exists today as *Sections* 31.31, 31.32 and 31.33, *Statutes* 1925.

CHAPTER 31, WISCONSIN STATUTES, 1925

WATER POWERS, MILLS AND MILLDAMS

31.01 Definitions.
31.02 Powers of the railroad commission.
31.03 Public utilities law applicable.
31.04 Permits to develop power.
31.05 Applications for permits to construct.
31.06 Hearing.
31.07 Applications for permits to operate and maintain existing dams.
31.08 Hearing.
31.09 Proposals to accompany applications.
31.10 Permit not to be valued.
31.11 Certificate of terms and forfeiture of permits.
31.12 Map, profile and plans.
31.13 Raising or enlarging existing dams.
31.15 Acquisition of existing dams.
31.16 Certificate of convenience and necessity; notice of hearing.
31.17 Hearing and determination.
31.18. Obligations of owners of bridges and dams.
31.19 Complaint of insufficiency of dam; inspection.
31.20 Inspection fee.
31.21 Transfer of permit.
31.22 Unlawful combinations, trusts.
31.23 Forfeitures.
31.24 Enforcement of forfeitures.
31.25 Nuisances, abatement.
31.26 Civil liabilities.
31.27 Adequate service; reasonable rates.
31.28 Court review of commission orders.
31.29 May employ hydraulic engineer and assistants.
31.30 Dams on Brule river prohibited.
31.31 Dams on nonnavigable streams.
31.32 Dams not to injure other dams or sites.
31.33 Under jurisdiction of railroad commission.

31.01 *Definitions.* Terms used in this chapter are defined as follows:

(1) "Commission" means the railroad commission of Wisconsin.

(2) "Navigable waters" means all waters declared navigable by chapter 30 of these statutes.

(3) "Permit" means legislative permission granted under section 31.06 to construct, operate and maintain a dam in or across navigable waters, or under section 31.08 to continue the operation and maintenance of any dam so situated which was constructed before such legislative permits were required.

(4) "Grantee" means the person, firm, corporation or municipality to whom a permit is granted, and all subsequent owners of the grant.

(5) "Corporation" means a private corporation organized under the laws of this state.

(6) "Municipality" means any town, village, city, or county in the state. [*Stats.* 1915 *s.* 1596—1; 1917 *c.* 474 *s.* 2]

31.02 *Powers of the railroad commission.* (1) The commission in the interest of public rights in navigable waters or to promote safety and protect life, health and property is empowered to regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained in navigable waters; and shall establish and maintain gauging stations upon the various navigable waters of the state and shall take other steps necessary to determine and record the characteristics of such waters.

(2) The commission is vested with authority and power to investigate and determine all reasonable methods of construction, operation, maintenance, and equipment for any dam so as to conserve and protect all public rights in navigable waters and so as to protect life, health and property; and the construction, operation, maintenance and equipment, or any or all thereof, of dams in navigable waters shall be subject to the supervision of the commission and to the orders and regulations of the commission made or promulgated under the provisions of this chapter of the statutes.

(3) The commission or any member or any agent or employe thereof shall at all times be accorded free access to any and all parts of any dam and appurtenances constructed or maintained in navigable waters.

(4) The commission may order and require any dam hereto-

fore or hereafter constructed to be equipped and operated, in whole or part, as follows:

(a) With slides and chutes for the passage of logs and timber products.

(b) With a lock, boat hoist, marine railway or other device of a size and construction sufficient to accommodate navigation.

(c) With good and sufficient fishway or fishways.

(d) With spillways or flood gates capable of permitting the passage through or over the same of freshets and floods during all seasons of the year.

(e) With booms, piers or other protection works ample to safeguard flood gates from trash or other floating material.

(5) The commission, whenever consistent with public rights, is authorized and empowered to make contracts for the removal of any material from the bed of any navigable lake, to fix and determine the compensation to be paid to the state of Wisconsin for material so removed, and to enter into contracts, on behalf of the state of Wisconsin, for the lease or sale of such material, with such conditions as may be necessary for the protection of the public interests and the interests of the state of Wisconsin, provided that no such contract shall be made to continue for a longer period than five years. [*Stats.* 1915 *s.* 1596—*2*; 1917 *c.* 474 *s.* 3; 1923 *c.* 410] Annotated †

31.03 *Public utilities law applicable.* In exercising its powers and performing its duties under this chapter the commission shall be guided and controlled also by the powers with which it is invested by sections 196.01 to 197.10, so far as such sections are applicable. [*Stats.* 1915 *s.* 1596—3; 1917 *c.* 474 *s.* 4]

31.04 *Permits to develop power.* Permits to construct, operate and maintain dams may be granted to persons, corporations or municipalities under the provisions of this chapter. [*Stats.* 1915 *s.* 1596—4, 1596—5; 1917 *c.* 474 *s.* 5; 1925 *c.* 222]

NOTE: This section is a revision of what formerly were Sections 1596—4 and 1596—5 created by Ch. 380, Laws 1915, which read as follows:

Section 1596—4. Permits may be granted, under the provisions of sections 1596—1 to 1596—26, inclusive, of the statutes, for any lawful private purpose, or for the purpose of developing hydraulic power and generating hydroelectric energy for sale or service to the public.

Section 1596—5. Any municipality, in order to create power to be used for lighting, heating, pumping and other purposes, may apply for and obtain a permit under the provisions of sections 1596—1 to 1596—26, inclusive, of the statutes, to construct and maintain or to maintain a dam within or without the corporate limits or boundaries thereof in this state; and in the acquisition of a permit and in the exercise and enjoyment of rights thereunder and for the purpose for which the permit was granted, shall have and may enjoy all the powers conferred upon municipalities by the statutes.]

31.05 *Applications for permits to construct.* Any person, firm, corporation or municipality desiring a permit to construct, operate, and maintain a dam shall file with the commission a written application therefor, setting forth:

(1) The name of the navigable waters in or across which a dam is proposed to be constructed and a specific description of the site for the proposed dam.

(2) The purpose or purposes for which the proposed dam is to be constructed, operated and maintained.

(3) In case the application is for a permit to construct, operate and maintain a dam for a private purpose or purposes, evidence that the described dam site is owned by the applicant.

(4) A general description of the proposed dam, of the material to be used in the construction thereof, and a general description of all booms, piers, and other protection works to be constructed in connection therewith.

(5) The approximate amount of hydraulic power that the proposed dam is capable of developing.

(6) The location of the nearest city or village and of the nearest existing dam above and below the site of the proposed dam.

(7) A map on the scale of not less than four inches to the mile showing the lands that may be affected by the construction, operation or maintenance of the proposed dam, or by any flowage that may be caused thereby and approximately the outline of such flowage, which map shall indicate the ownership of each tract of land within the flowage.

(8) Such additional information of any nature that may be required by the commission. [*Stats.* 1915 *s.* 1596—6; 1917 *c.* 474 *s.* 6; 1925 *c.* 222] Annotated†

31.06 *Hearing.* (1) Upon receipt of an application for a permit the commission shall fix a time not more than eight weeks thereafter, and a convenient place, for a public hearing thereon; it shall also give notice of such time and place to the applicant who shall cause the same to be published once each week for three successive weeks before such hearing in at least one newspaper, designated by the commission, in each county in which riparian lands will be affected by the proposed dam.

(2) In addition to such publication the applicant, not less than twenty days prior to such hearing, shall mail to every person interested in any lands that will be affected by the proposed dam and whose post-office address can by due diligence be ascertained, notice of the time and place set for such hearing. This notice shall be accompanied by a general statement of the nature of the application and shall be forwarded to such persons by registered mail in a sealed and postpaid envelope properly addressed. Proof of such publication and notice shall be filed with the commission.

(3) At such hearing or any adjournment thereof the commission shall consider the application, and shall take evidence offered by the applicant and other persons in support thereof or in opposition thereto, may require the amendment of the application, and if it shall appear that the construction, operation or maintenance of the proposed dam will not materially obstruct existing naviga-

tion or violate other public rights and will not endanger life, health or property, the commission shall so find and a permit is hereby granted to the applicant. [*Stats.* 1915 *s.* 1596—7; 1917 *c.* 474 *s.* 7]

31.07 *Applications for permits to operate and maintain existing dams.* Any person, firm, corporation or municipality desiring a permit to operate and maintain a dam constructed in or across navigable waters without legislative permission prior to the tenth day of July, 1915, shall file with the commission a written application therefor setting forth:

(1) The name of the navigable waters in or across which such dam was constructed and a specific description of the dam site.

(2) The year in which the construction of the dam was completed, and a detailed description of the dam and equipment, including the maximum height or head of water that may be maintained thereby and the kind and character of material of which the dam is constructed.

(3) The purpose for which the dam was theretofore operated and is operated at the time application hereunder is made, and the purpose for which it is proposed to operate and maintain the dam.

(4) The approximate amount of hydraulic power developed thereby.

(5) The location of the nearest city or village and of the nearest existing dam above and below the dam site.

(6) Such additional information of any nature whatsoever as may be required by the commission. [*Stats.* 1915 *s.* 1596—8; 1917 *c.* 474 *s.* 8] Annotated †

31.08 *Hearing.* Upon receipt of an application under section 31.07 procedure shall be had substantially as required by section 31.06, and if the commission shall find that such operation and maintenance does not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, a permit is hereby granted to the applicant. [*Stats.* 1915 *s.* 1596—9; 1917 *c.* 474 *s.* 9]

31.09 *Proposals to accompany applications.* Each applicant for a permit to construct, operate and maintain a dam for the purpose of developing power or for the purpose of aiding in the development of power by other dams through the creation of reservoirs or otherwise, and each applicant for a permit to construct, operate and maintain a dam for any other purpose whatsoever, which is capable of developing fifty theoretical horse power or more available for fifty per cent of the time throughout the year, shall file with his application for a permit, in addition to the requirements of section 31.05 or section 31.07, as the case may be, the following proposals:

(1) That the commission prior to the time the permit is granted shall value the dam site and all flowage rights and other property necessary for the purposes set forth in the application for the permit, whether the same or any part thereof are owned by the applicant or not.

(2) That the commission shall audit all outlays for property and for the construction of the dam, buildings, and other structures and works constructed, maintained, and operated and used and useful under the permit.

(3) That the permit, if granted, shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all

right to any further compensation. [*Stats.* 1915 *s.* 1596—9*m*; 1917 *c.* 474 *s.* 10; 1925 *c.* 222]

31.10 *Permit not to be valued.* Each and every permit is granted, and shall be conclusively deemed to be accepted, subject to the condition that no element of value whatever shall ever attach to or be allowed for such permit in and of itself in the sale or acquisition of the property used and useful under such permit or otherwise. [*Stats.* 1915 *s.* 1596—10; 1917 *c.* 474 *s.* 11]

31.11 *Certificate of terms and forfeiture of permits.* The commission shall issue to every grantee of a permit a certificate evidencing a grant of the permit allowed by law. Every permit, and every franchise heretofore granted by the legislature, to construct, maintain and operate a dam shall become null and void, unless the dam thereby authorized be completed within five years from the time when the permit or the franchise was granted; but the commission, for good cause, may extend such time for a period not exceeding two years. [*Stats.* 1915 *s.* 1775*c*; 1917 *c.* 474 *s.* 11]

31.12 *Map, profile and plans.* (1) The grantee of a permit under section 31.06, to construct, maintain and operate a dam, before commencing any work of construction authorized by the permit, shall submit to the commission a complete map and profile on the scale of not less than one inch per thousand feet showing the land that may be affected by the construction and maintenance of the dam, or by any flowage that may be caused thereby, and the outline of the flowage, and such other hydrographic and topographic data as the commission may prescribe, and shall also file complete detailed plans and specifications for the proposed dam, including all booms, piers, or other protection works.

(2) The commission shall examine the map, profile, plans and specifications; shall hear the grantee thereon and may reject the same or any part thereof, if unsatisfactory or incomplete, or may suggest and require modifications thereof. If the map, profile and plans and specifications are satisfactory and complete, or, if the same shall be modified as suggested and required, the commission shall

so find and approve the same, and thereupon the grantee shall have authority to construct the proposed dam in accordance therewith, but the commission may, at any time during the construction of any dam and in the interest of the public safety, or of any public rights in navigable waters, authorize, order or require such changes in the plans and specifications and the construction of the dam as shall be necessary.

(3) If the commission, in the case of an application for a permit to construct a dam with a capacity of less than two hundred fifty hydraulic horse power at ordinary stage of water, shall find that the information and data furnished in the original or amended application is sufficient, the applicant shall not be required to furnish the additional or more detailed information or data specified in subsections (1) and (2) of this section. The commission may, however, at any time during the construction of any such dam authorize, order or require changes in the construction or the method or plan of construction thereof, as provided in subsection (2) of this section.

(4) Within ten days after the completion of any dam the grantee shall file with the commission a verified statement that the same was constructed in accordance with the plans and specifications approved by the commission; or in case no plans and specifications were required to be filed, then that the dam was constructed in accordance with the description contained in the application. [*Stats.* 1915 *s.* 1596—11; 1917 *c.* 474 *s.* 12]

31.13 *Raising or enlarging existing dams.* (1) If the owner of any existing dam wishes to raise or enlarge the same, he may apply to the commission for permission so to do, but the permission granted under this section shall be in amendment of any existing franchise, license, or permit previously granted authorizing the construction or maintenance of such dam only to the extent of giving the right so to raise or enlarge such dam, and shall in no way enlarge, alter, abridge or nullify property rights, privileges or obligations as to such dam, or the maintenance or operation thereof theretofore acquired or incurred. In addition to the requirements of

subdivisions (1), (6) and (7) of section 31.05, his application shall state:

(a) The year in which his dam was completed.

(b) If constructed by legislative permission, a statement of the act of the legislature authorizing the same.

(c) A detailed description of the dam, including the maximum height or head of water that may be maintained thereby and the kind and character of material of which the same is constructed.

(d) The purpose for which such dam has been and is now used and the purpose for which it is proposed to use the same.

(e) The approximate amount of hydraulic power developed thereby.

(f) Such additional information of any nature whatsoever as the commission may require.

(2) Upon receipt of an application under this section procedure shall be had substantially as required by section 31.06; and if the commission shall find that the dam, raised or enlarged or rebuilt, or rebuilt, enlarged and raised in accordance with the application, will not materially obstruct existing navigation or violate other public rights, and will not endanger life, health or property, permission is hereby granted to raise or enlarge or rebuild, or rebuild, enlarge and raise the same in accordance with the application. [*Stats.* 1915 *s.* 1596—12; 1917 *c.* 474 *s.* 13]

31.14 [*Repealed by* 1919 *c.* 571 *s.* 3]

31.15 *Acquisition of existing dams.* (1) Every domestic corportation lawfully engaged in the business of producing, transmitting, delivering or furnishing heat, light, water, power, or street or interurban electric railway service to or for the public may, for the purpose of developing power and generating energy for public use in and about such business, acquire any dam in or across any navigable waters of this state and all flowage and other rights and property necessary to the maintenance thereof, or any undeveloped water power or dam site upon any such waters within this state, except as provided otherwise in subsection (2).

(2) No award in any condemnation proceedings authorized by subsection (1) shall be effective, and no corporation shall purchase or otherwise acquire any such property until it shall have obtained from the commission a certificate that public convenience and necessity require the acquisition of the same, at the amount fixed by such award or agreed upon with the owner thereof. [*Stats.* 1915 *s.* 1596—14; 1917 *c.* 474 *s.* 15; 1919 *c.* 571 *s.* 2] Annotated †

31.16 *Certificate of convenience and necessity; notice of hearing.* (1) Any such corporation desiring to purchase or acquire any property pursuant to section 31.15 shall apply to the commission for a certificate of public convenience and necessity. Such application shall state the name of the owner or owners of the property sought to be acquired; the business in connection with which it is desired to utilize said property; the specific public purpose or purposes for which it is proposed to use the same; the compensation or price to be paid therefor, and such other information as the commission may require; and shall contain a statement to the effect that the said corporation agrees to cancel all contracts for the sale of hydroelectric power outside this state, which shall at any time be found by the commission to interfere with adequate service and reasonable rates to the people of this state.

(2) Upon receipt of such application the commission shall fix a convenient time and place for a public hearing thereon, which time shall not be more than eight weeks from the date of filing such application. Notice of the time and place so fixed shall be given to the applicant, who shall cause the same to be published at least once each week for three successive weeks preceding such hearing in a newspaper designated by the commission, and the applicant shall also, not less than twenty days prior to said date, serve notice thereof upon the owners of such property personally, or by registered mail, if the post-office address of such owners, can by due diligence be ascertained. Proof of such publication and service of such notice shall be filed with the commission. [*Stats.* 1915 *s.* 1596—15; 1917 *c.* 474 *s.* 16]

31.17 *Hearing and determination.* (1) At such hearing or any adjournment thereof, the commission shall consider such application and shall receive the evidence offered by the applicant and others, in person or by agent, in support thereof and in opposition thereto.

(2) If the commission shall find that the acquisition and use of such property in connection with the business of the applicant for the purpose or purposes and at the price or compensation set forth in the application would be a public convenience; that the applicant possesses the financial ability to utilize the property for such purpose or purposes, and that a public necessity requires such acquisition and use, the commission shall grant and issue a certificate that public convenience and necessity require the utilization of such property as proposed by the applicant.

(3) The provisions of section 31.15 shall not apply to the acquisition of flowage rights necessary for the improvement or development of dams or dam sites previously acquired. [*Stats.* 1915 *s.* 1596—16; 1917 *c.* 474 *s.* 17]

31.18 *Obligations of owners of bridges and dams.* (1) The grantee of any permit, the owner of any dam constructed before permits were required by law, and the owner of any bridge at the city of Portage or at any point above that city, over the Wisconsin river, shall maintain and operate all such dams, slides, chutes, piers, booms, guide booms, weirs, tunnels, races, flumes, sluices, pits, fishways, locks, boat hoists, marine railways and all other equipment required by the commission for the protection of public rights in such waters, and for the preservation of life, health and property, in good repair and condition, and shall not wilfully, or otherwise, injure, remove or destroy the same, or any part thereof, unless the commission shall have approved such removal or destruction in writing.

(2) The owner of any such dam shall open such slide or chute for the passage of any craft or material lawfully navigating the stream, whenever requested so to do by the person in charge of such navigation, without charge or toll therefor. But such owner

shall be under no obligation to otherwise aid passage through the slide or chute.

(3) Except when emergency shall require the same for the protection of life, health or property, no substantial alteration or addition shall be made to any dam heretofore or hereafter constructed without obtaining an order therefor from the commission, which order may be issued only after an investigation and upon a finding that the proposed alterations or additions will not impair the sufficiency of such dam or any existing public rights in such waters.

(4) The railroad commission may in the interest of public rights in navigable waters, or to promote safety and protect life, health and property, require the grantee of any permit, under this chapter, or of any permit or authorization heretofore provided for by legislative enactment, prior to flowing any lands by the construction of a dam thereunder, to remove from such lands all or any portion of the standing and fallen timber and all or any portion of the brush. [*Stats.* 1915 *s.* 1596—17, 1601, 1602, 1605; 1917 *c.* 339; 1917 *c.* 474 *s.* 18, 18a; 1925 *c.* 337] Annotated *

31.19 *Complaint of insufficiency of dam; inspection.* The railroad commission shall examine at least once in each year each dam having a theoretical horse power capacity of seven hundred fifty horse power or more and which is maintained or operated in or across navigable waters, and in addition thereto and upon complaint in writing from the mayor of any city, supervisor of any town, or the president or trustee of any village, that any dam maintained or operated in or across any waters whether navigable or nonnavigable, or any reservoir is in an unsafe condition, or from any person that his property or any property under his control is endangered by a dam or reservoir, the commission shall investigate or cause an investigation to be made of such complaint, or the commission may, upon its own motion, examine any dam or reservoir, and, in any case, if it shall find that any dam or reservoir is not sufficiently strong, or is unsafe, and dangerous to life or property, it shall determine what alterations, additions or repairs are neces-

sary to be made and shall order the owner, or person having control of such dam or reservoir to cause such alterations or repairs to be made within a time to be limited by the order; and the commission may cause to be drawn off, in whole or in part, the water in said reservoir or impounded by said dam, when it shall determine that such action is necessary to prevent impending danger to persons or property. [*Stats.* 1915 *s.* 1596—18; 1917 *c.* 109; 1917 *c.* 474 *s.* 19; 1917 *c.* 538 *s.* 1]

31.20 *Inspection fee.* Every owner, excepting municipalities, of a dam heretofore or hereafter constructed in or across navigable waters shall pay to the commission annually, on or before the first day of February, for the purpose of defraying the actual expense of the commission incurred in inspecting and supervising the construction or maintenance, or both, of such dam and equipment, an inspection fee of not to exceed ten cents per theoretical horse power capacity of such dam at an ordinary stage of water, said fee however, not to be less than twenty-five dollars in any case, if such actual expenses of the commission shall equal that amount. The amount of such fee shall be determined annually by the commission, and notice of the amount due shall be forwarded by mail to each such owner, or the agent thereof, not later than December first of each year. Inspection fees received by the commission shall be paid into the state treasury. [*Stats.* 1915 *s.* 1596—19; 1917 *c.* 474 *s.* 20; 1917 *c.* 538 *s.* 2] Annotated †

31.21 *Transfer of permit.* (1) No transfer or assignment of any permit granted under section 31.06 or section 31.08 shall be valid or of any effect whatsoever unless the same shall be in writing and a certified copy thereof shall, within ten days after the execution thereof, be filed with the commission and unless such transfer or assignment is approved in writing by the commission; and no such transfer or assignment shall be approved by the commission except after an investigation and a finding that the transfer or assignment is not made or intended to be made for a purpose or to create a condition prohibited by section 31.22. No permit shall be transferred or assigned to a foreign corporation, nor shall any permit

granted to a municipality be assigned or transferred to any person, firm, or corporation, otherwise than as security for a loan made in good faith and concurrently with and as consideration for such transfer or assignment, and no foreign corporation shall have power to acquire title to any such permit, nor shall any person, firm or corporation have power to acquire title to a permit granted to or acquired by a municipality, otherwise than in the enforcement of such security, and in no case shall any such foreign corporation hold title to or operate under any such permit for a period longer than three years.

(2) No municipality shall make or execute any lease or other contract with any person, firm, or corporation for the sale or use of hydraulic or hydroelectric power developed or generated by such municipality under a permit granted under section 31.06 or section 31.08 for a period longer than ten years, unless the same shall be first approved by the commission, after investigation and upon a finding that such lease or contract will not impair or interfere with the purpose or uses for which such dam was acquired or constructed by the municipality. [*Stats.* 1915 *s.* 1596—20; 1917 *c.* 474 *s.* 21]

31.22 *Unlawful combinations, trusts.* If any dam maintained under a permit,

(1) Shall be owned, leased, trusteed, possessed or controlled in any manner whatsoever that makes it form a part of or in any way effect an unlawful combination;

(2) Or shall be in any wise controlled by any combination in the form of an unlawful trust;

(3) Or forms the subject of any contract or conspiracy to limit the output of any hydraulic or hydroelectric power derived therefrom, or to restrain unlawfully trade in the generation, sale or distribution of hydraulic or hydroelectric power derived therefrom.

The state may take possession thereof by proceedings instituted by the commission, as in cases of receivership, and in such proceedings the members of the commission shall be appointed to act as receivers during such period as the court may determine. [*Stats.* 1915 *s.* 1596—21; 1917 *c.* 474 *s.* 22]

31.23 *Forfeitures.* (1) Every person or corporation that shall obstruct any navigable waters and thereby impair the free navigation thereof, or shall place therein or in any tributary thereof any substance whatever that may float into and obstruct any such waters or impede their free navigation, or shall construct or maintain, or aid in the construction or maintenance therein of any bridge, boom or dam not authorized by law, shall forfeit for each such offense, and for each day that the free navigation of such stream shall be obstructed by such bridge, boom, dam or other obstruction, a sum not exceeding fifty dollars. But the floating or movement of logs or timber in navigable waters, or the necessary use of temporary booms in the course of such floating or movement shall not incur such forfeiture.

(2) Every person or corporation violating any of the provisions of this chapter, other than those mentioned in subsection (1) of this section, or violating any order made by the commission pursuant to any provision of this chapter, shall forfeit for each such violation not more than one thousand dollars. [*Stats.* 1915 *s.* 1596 *sub.* 3, 1596—22 *sub.* 1, 1598; 1917*c.* 474 *s.* 23] Annotated * †

31.24 *Enforcement of forfeitures.* (1) It shall be the duty of the commission to report to the governor every forfeiture incurred under subsection (1) of section 31.23 and every nuisance committed in violation of section 31.25 and the governor shall thereupon cause the attorney-general, or some other person duly authorized by the governor to act instead of the attorney-general, to institute proceedings to recover such forfeiture or abate such nuisance.

(2) It shall be the duty of the attorney-general, when so requested by the governor, and otherwise the duty of the district attorney of the proper county, to institute proceedings to recover any forfeiture incurred under this chapter other than those specified in subsection (1) of section 31.23.

(3) All such forfeiture shall be recovered by civil action as provided by chapter 288 of the statutes and when collected shall be paid directly into the state treasury. [*Stats.* 1915 *s.* 1596 *sub.* 4, 1596—22 *sub.* 2; 1917 *c.* 474 *s.* 24] Annotated *

31.25 *Nuisances, abatement.* Every dam, bridge or other obstruction constructed or maintained in or over any navigable waters of this state in violation of the provisions of this chapter, and every dam not furnished with a slide, chute or other equipment prescribed by the commission, is hereby declared to be a public nuisance, and the construction thereof may be enjoined and the maintenance thereof may be abated by action at the suit of the state or any citizen thereof. [*Stats.* 1915 *s.* 1596 *sub. 2*, 1603; 1917 *c.* 474 *s.* 25] Annotated * †

31.26 *Civil liabilities.* (1) The owner of any dam or of any privately owned bridge across the Wisconsin river or the Black river or any of their tributaries shall be liable for all damages occasioned to property by a failure to provide such dam or bridge with slides, booms and chutes as required by subsection (1) of section 31.18. The person or party suffering any such damage shall have a lien upon the dam and all mills, machinery and appurtenances of such owner erected thereon, or served with water thereby, and on the lands adjoining, not exceeding forty acres; or, as the case may be, a lien upon such bridge and its approaches.

(2) The claimant of such lien shall file a notice thereof in writing in the office of the clerk of the circuit court of the county in which the dam or bridge is located within sixty days after sustaining such damages and shall commence an action to enforce the lien within six months after filing such notice. Such lien shall accrue upon the filing of such notice and failure to file the same or to commence such action within the times specified therefor respectively shall operate as a waiver of the lien. Judgment for the plaintiff for the recovery of damages and declaring such lien may be enforced by an execution sale of the property affected as in ordinary actions at law, and upon such sale all rights to maintain such dam or bridge shall pass to the purchaser.

(3) In case of any personal injury by reason of any such neglect or failure the damages sustained thereby may be recovered and a lien and judgment enforced in like manner; and if death results an

action may be maintained by the representatives of the deceased in the manner provided in other cases of death resulting from negligence or wrong.

(4) No common law liability, and no statutory liability provided elsewhere in these statutes, for damage resulting from or growing out of the construction, maintenance or operation of any dam is released, superseded, or in any manner affected by the provisions of this chapter; and this chapter creates no liability on the part of the state for any such damages. [*Stats.* 1915 *s.* 1596—23, 1604, 1606; 1917 *c.* 474 *s.* 36]

31.27 *Adequate service; reasonable rates.* Upon complaint by any party affected, setting forth that any grantee of a permit to develop hydraulic power and generate hydroelectric energy for sale or service to the public is not furnishing citizens of this state with adequate service at a reasonable rate in consequence of sales of such energy outside of the state, the commission shall have power to declare any or all contracts entered into by said grantee for such sales null and void in so far as they interfere with such service or rate. Such declaration shall be made only after a hearing and investigation and a recorded finding that convenience and necessity require the sale of a specified part or all such energy within this state. [*Stats.* 1915 *s.* 1596—24; 1917 *c.* 474 *s.* 27]

31.28 *Court review of commission orders.* The state or any party to a proceeding authorized by this chapter to be had before the commission may have a review in the circuit court for Dane county of any order, finding or determination made therein by the commission, and all of the provisions of sections 196.01 to 197.10, inclusive, so far as applicable, shall apply to the review herein provided for, including the right of appeal to the supreme court. Upon such review and appeal, the findings and determination of the commission shall constitute prima facie evidence of the facts therein found. [*Stats.* 1915 *s.* 1596—25; 1917 *c.* 474 *s.* 28]

31.29 *May employ hydraulic engineer and assistants.* The commission is authorized to employ and fix the salaries of a competent

hydraulic engineer and other assistants necessary to carry out the provisions of this chapter. [*Stats.* 1915 *s.* 1596—27; 1917 *c.* 474 *s.* 32]

31.30 *Dams on Brule river prohibited.* It is declared to be the policy of the state to prohibit forever the building or maintaining of any dam or dams across the Brule river or any of its tributaries in Douglas county; and all rights, privileges and franchises granted prior to June 26, 1905, to any person or corporation to improve said Brule river or any of its tributaries in Douglas county; and all rights, privileges and franchises annulled. No domestic corporation organized subsequent to the date aforesaid shall exercise any of the powers or privileges authorized or conferred by sections 180.15 to 180.18, inclusive, in, across or along said river or any of its tributaries in the county of Douglas. [*Stats.* 1915 *s.* 1596*m;* 1917 *c.* 474 *s.* 33]

31.31 *Dams on nonnavigable streams.* Any person may erect and maintain upon his own land, and, with the consent of the owner, upon the land of another, a water mill and a dam to raise water for working it upon and across any stream that is not navigable in fact for any purpose whatsoever upon the terms and conditions and subject to the regulations hereinafter expressed; and every municapality may exercise the same rights upon and across such streams that they may exercise upon or across streams navigable for any purpose whatsoever. [*Stats.* 1915 *s.* 3374, 3374*a;* 1917 *c.* 474 *s.* 34] Annotated * †

31.32 *Dams not to injure other dams or sites.* No such dam shall be erected to the injury of any mill lawfully existing, either above or below it on the same stream; nor to the injury of any mill site on the same stream on which a mill or milldam shall have been lawfully erected and used or is in the process of erection, unless the right to maintain a mill on such last-mentioned site shall have been lost or defeated by abandonment or otherwise; nor to the injury of any such mill site which has been occupied as such by the owner thereof, if such owner, within a reasonable time after commencing

such occupation, completes and puts in operation a mill for the working of which the water of such stream shall be applied. [*Stats.* 1915 *s.* 3375; 1917 *c.* 474 *s.* 35] Annotated * †

31.33 *Under jurisdiction of railroad commission.* (1) ALL HERETOFORE OR HEREAFTER CONSTRUCTED—ACTION FOR DAMAGES. All mills and milldams lawfully erected or constructed, on streams not navigable at the time, under and pursuant to the provisions of chapter No. 48 of the territorial laws of 1840, chapter 62, laws of 1857, chapter 56, R. S. 1858, chapter 146, R. S. 1878, chapter 146, R. S. 1898, chapter 146, Wisconsin Statutes of 1911, 1913 or 1915 or under and pursuant to any special, private or local act, or under any other act whatsoever, which are not now abandoned but are still in existence and use, and all mills, and milldams heretofore or hereafter erectedor constructed on streams not navigable in fact for any purpose whatsoever, shall be subject to and regulated and controlled by the provisions, so far as applicable, of sections 31.02, 31.03, 31.12, 31.18, 31.19, 31.20, 31.22, 31.25, 31.26 and 31.28 of the statutes, except that the provisions of said sections shall not prevent the owner of any land flooded or otherwise injured by any such milldam from recovering, by action at law, full compensation for all damages resulting to him in times past and that will result to him in the future in consequence of such flooding and injury; provided that no damages suffered more than three years before the commencement of such action shall be recovered. The amount recovered shall constitute a first lien upon the milldam and upon the mill, if any, and such lien may be enforced by execution sale of the property affected. In every such action the amount paid or secured to be paid under prior laws as damages shall be considered and proper allowance made therefor. The authority hereby granted to bring such action shall not be construed as precluding the owner from proceeding under the provisions of chapter 32. Such owner may not exercise his option to bring such action after condemnation proceedings have been commenced against his property under the provisions of said chapter 32.

(2) LICENSE. A license is hereby granted to each owner of any such milldam now in existence and use, and to each owner of any such milldam hereafter constructed, to maintain and use the same to operate mills or machinery, or for any other lawful private or public purpose, but subject, however, to the supervision of the commission acting under the sections of the statutes enumerated in subsection (1). The right created by such license shall follow the title to the milldam and a conveyance of the latter shall transfer such right to the grantee.

(3) INTERPRETATION. Whenever the sections of the statutes so enumerated are applied to mills or milldams specified in subsection (1) every reference in any of them to a "permit" or to a "grantee" of a permit shall be regarded as referring respectively to a license granted by this section and to the owner of such a mill or milldam.

(4) HEIGHT. The height to which water may be raised by any such milldam and the length or period of time for which it may be kept up each year, may be restricted and regulated by the orders of the commission.

(5) VIOLATION OF ORDERS, PENALITIES. Every person, firm or corporation violating any of the orders respecting any such mill or milldam made by the commission shall forfeit for each such violation a sum not exceeding five hundred dollars which may be recovered by civil action as provided by chapter 288. [1917 *c.* 474 *s.* 36; 1919 *c.* 702 *s.* 25; 1921 *c.* 422 *s.* 10] Annotated * †